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12 **STATE OF CALIFORNIA**
13 **NEW MOTOR VEHICLE BOARD**

14 In the Matter of the Protest of)

15 FOLSOM CHEVROLET, INC. d/b/a FOLSOM)
CHEVROLET,)

16 Protestant,)

17 v.)

18 GENERAL MOTORS, LLC,)

19 Respondent.)

Protest No.: PR-2483-16

**RESPONDENT GENERAL MOTORS
LLC'S PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

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1. Respondent General Motors LLC (“General Motors” or “GM”) submits these Proposed Findings of Fact and Conclusions of Law in connection with its Post-Hearing Brief for this protest commenced by Protestant Folsom Chevrolet, Inc. d/b/a Folsom Chevrolet (“Folsom Chevrolet”).

PROCEDURAL BACKGROUND

I. THE PARTIES

2. General Motors is an automobile manufacturer and distributor with its headquarters in Detroit, Michigan. In the United States, General Motors markets its vehicles under the Chevrolet, Buick, GMC, and Cadillac brands, also known as "line-makes." General Motors sells these vehicles to a network of authorized dealerships. The dealerships, in turn, sell those vehicles and provide authorized service to the public.

3. Folsom Chevrolet is a Chevrolet dealership located in Folsom, California, owned and operated by Mr. Marshal Crossan ("Mr. Crossan") since 1992. The dealership is intended to serve consumers in the Folsom area, as well as Sacramento and points to the east and south of Folsom. The dealership moved into its present location in the Folsom Auto Mall in 1998.

II. Folsom Chevrolet's Protest & the Hearing

4. As described in further detail below, General Motors served Folsom Chevrolet with a Notice of Termination on November 3, 2016. (R238.) Folsom Chevrolet responded by filing this Protest, which resulted in a statutory stay of the termination pending a determination of “good cause” under Cal. Veh. Code Sections 3060 and 3061.

5. Pursuant to the Vehicle Code, a ten-day merits hearing was held from January 29, 2018 to February 9, 2018. At the hearing, General Motors had the burden of establishing good cause by a preponderance of the evidence. Cal. Veh. Code § 3066(b); Cal. Evid. Code § 115 (defining “burden of proof”).

6. General Motors called the following witnesses at the hearing:

Michael Stinson Chevrolet Zone Manager, Northern California (RT Vols. 1, 2, 10)

Paul Ryan District Manager, Commercial Sales (RT Vol. 2)

Leonard Deprez District Manager for Aftersales, Chevrolet (RT Vol. 2)

1	Saul Escalante	District Sales Manager, Chevrolet (RT Vol. 2)
2	Al Giguere	Manager, Dealer Network Planning & Analysis (RT Vols. 2, 3)
3	Bob Muiter	Director, GMNA Order Fulfillment (RT Vol. 3)
4	Ronald Meier	Regional Director, Chevrolet Sales & Service, Western Region (RT Vol. 4)
5	Brian Gaspardo	Managing Partner, O'Neill & Gaspardo. Mr. Gaspardo provided expert testimony regarding accounting and investment at the hearing. (RT Vol. 4)
6	Sharif Farhat	Vice President of Expert Analytical Services, Urban Science. Mr. Farhat provided expert testimony regarding dealer network analysis at the hearing. (RT Vols. 5, 10)

7. General Motors also designated and submitted portions of the deposition testimony of Lisa Castro, Larry Crossan, Joe Gagliardi, and Rene Schoonbrood. (R250A-D.)

8. Folsom Chevrolet called on its behalf Marshal Crossan (RT Vols. 6-9), Joe Gagliardi (RT Vol. 8), Larry Crossan (RT Vol. 8), Drew Crossan (RT Vol. 9), Rene Schoonbrood (RT Vol. 9), Brian Kaestner (RT Vol. 9), and experts Carl Woodward (RT Vol. 6) and Ted Stockton (RT Vols. 7, 10).

9. Following the hearing, the parties conducted a joint market drive with ALJ Matteuci, visiting Chevrolet dealerships in the Sacramento area, as well as driving Route 50 east of Folsom to Placerville, California. The route is described in the jointly submitted Joint Exhibit J-1.

PROPOSED FINDINGS OF FACT

I. FOLSOM CHEVROLET'S CONTRACTUAL OBLIGATIONS UNDER THE DEALER AGREEMENT

10. In 2015, General Motors and Folsom Chevrolet entered into a Dealer Sales and Service Agreement ("Dealer Agreement") that grants Folsom Chevrolet the right to sell and service Chevrolet vehicles. (*See* R201 (Dealer Agreement).) In return, the Dealer Agreement requires Folsom Chevrolet to meet certain standards and satisfy certain obligations, including performance requirements for sales and customer service, as set forth below.

11. The 2015 Dealer Agreement replaced a nearly identical agreement signed in 2010. (RT Vol. 1, 58:1-22 (Stinson).) Dealer Agreements are typically renewed in this fashion every five to ten years. A franchisor may not refuse to continue a franchise agreement without the franchisee's

1 consent, expiration of the protest period, or a determination of good cause by the Board. Cal. Veh.
2 Code § 3060(a).

3 12. Mr. Crossan had the opportunity to review the Dealer Agreement with an attorney
4 before signing on behalf of Folsom Chevrolet. (RT Vol. 8, 125:17-126:12 (M. Crossan).) However,
5 he did not do so. (*Id.*)

6 **A. Purpose of Agreement**

7 13. The majority of total sales for General Motors are retail sales—approximately 80 to
8 85% of total sales in a given year. (RT Vol. 2, 458:25-459:16 (Giguere).) However, General Motors
9 cannot sell its vehicles direct to retail consumers. (*Id.*; Cal. Veh. Code § 11713.3(o)(1).) Instead, it
10 must sell its vehicles through a network of independent dealerships (the “dealer network”) that have
11 their own priorities and preferences, mediated through the Dealer Agreement.

12 14. The Dealer Agreement therefore focuses on retail sales by the dealer. (RT Vol. 2,
13 458:25-459:16 (Giguere).) Indeed, Mr. Meier, the Regional Director for Chevrolet’s Western
14 Region, testified that the “essence of th[e] agreement is a retail agreement.” (RT Vol. 4, 72:4-10
15 (Meier).) Mr. Giguere concurred: “[R]etail is the overwhelming majority of the sales and GM is
16 dependent upon its dealers primarily. That’s the reason really that we have thousands of dealers in
17 local communities around the country is to serve the needs of retail customers.” (RT Vol. 2, 462:2-9
18 (Giguere).) And Mr. Muiter agreed as well: “You don’t need a dealer in Folsom, California to sell to
19 fleet customers in Anaheim, California. You can put that dealer anywhere. We do need a dealer in
20 Folsom, California to address the retail market.” (RT Vol. 3, 11:3-10 (Muter).)

21 15. Fleet and small business customers are covered by a separate Business Elite
22 agreement. (RT Vol. 4, 72:15-18 (Meier).) That is a voluntary program offered to dealers who wish
23 to maximize sales to businesses, *i.e.*, fleet and small business sales. (RT Vol. 2, 326:19-21 (Ryan).)
24 Thus, when the Dealer Agreement refers to “customers,” it is referring to “retail customers of the
25 dealership.” (RT Vol. 4, 71:14-15 (Meier).)

26 **B. Area of Primary Responsibility**

27 16. The Dealer Agreement includes a Notice of Area of Primary Responsibility, which
28 assigns collections of US Census Tracts to Folsom Chevrolet for which it is the primary retail seller

1 of new Chevrolet vehicles. (*See* R201 (Dealer Agreement) at 8¹ § 4.2 (“Dealer is responsible for
2 effectively selling, servicing and otherwise representing General Motors Products in the area
3 designated in a Notice of Area of Primary Responsibility.”).) The collection of census tracts assigned
4 to a dealer is principally determined by the geographical proximity of the dealership location and the
5 population center of each tract. (RT Vol. 3, 137:4-21 (Giguere).) Folsom Chevrolet is assigned both
6 an Area of Primary Responsibility (“APR”), an area shared with other Chevrolet dealerships—
7 roughly, the Sacramento metro area—and an Area of Geographic Sales and Service Advantage
8 (“AGSSA”), which is smaller and specific to Folsom Chevrolet.

9 17. The AGSSA assignment reflects the area where the dealership has a competitive
10 advantage over other dealerships due solely to geographical proximity and customer convenience.
11 (RT Vol. 3, 210:7-18 (Giguere).) It is configured based primarily on drive distance along the existing
12 road network. (RT Vol. 3, 137:4-14 (Giguere).) It also considers drive time as a secondary proximity
13 metric. (RT Vol. 3, 137:15-21 (Giguere).) The definition may also be based on buyer behavior data,
14 also known as “winner” data, which shows “which dealer is selling the most units within a particular
15 tract.” (RT Vol. 3, 137:22-138:9 (Giguere).)

16 18. General Motors updates APR and AGSSA descriptions and definitions periodically,
17 including after each census, when census tract information changes across the country. (RT Vol. 3,
18 136:6-21 (Giguere).) After any proposed APR or AGSSA change, the Dealer Agreement provides
19 that dealers may submit additional information for GM’s review within thirty days. (R201.007 §
20 4.2.)

21 19. An AGSSA does not prevent or restrict vehicle sales—Folsom Chevrolet is free to
22 sell vehicles to customers anywhere in the country, and other dealerships are free to sell vehicles to
23 customers located in Folsom Chevrolet’s AGSSA. (RT Vol. 2, 473:7-16 (Giguere).) However,
24
25

26 ¹ Respondents’ exhibits each contain a Bates-stamped label in the upper-right designating the
27 exhibit and page number, in the format, e.g. R2XX.0XX. For clarity, citations in this brief will be to
28 those page numbers, where available.

1 dealers are restricted from displaying vehicles for advertising purposes in another dealer's AGSSA.
2 (RT Vol. 2, 237:21-238:16 (Stinson).)

3 **C. Sales Performance & RSI**

4 20. Article 5.1.1 of the Dealer Agreement states that "Dealer agrees to effectively,
5 ethically and lawfully sell and promote the purchase, lease and use of Products by consumers located
6 in its Area of Primary Responsibility." (R201.009 § 5.1.1.) Similarly, Article 9 states that "General
7 Motors['] willingness to enter into this Agreement is based in part on Dealer's commitment to
8 effectively sell and promote the purchase, lease and use of Products in Dealer's Area of Primary
9 Responsibility." (*Id.* at 17 § 9.)

10 21. In furtherance of this goal, and as authorized by Dealer Agreement Article 5.1.1(f)
11 ("Dealer agrees to . . . comply with the retail sales standards established by General Motors"),
12 General Motors has established a measure of sales performance known as the Retail Sales Index
13 ("RSI"). As the name indicates, it focuses on retail sales specifically. (RT Vol. 2, 461:23-462:1
14 (Giguere).)

15 22. RSI essentially compares the number of new retail vehicles sold by Folsom Chevrolet
16 against the number that it was expected to sell, based on the franchisor's statewide market
17 penetration, local market preferences, and the number of new vehicles actually registered in Folsom
18 Chevrolet's AGSSA in segments in which GM vehicles compete. (R244 (Farhat Report) at ¶ 20.) An
19 RSI of 100 indicates that a dealership achieved its sales expectations, *i.e.*, state average performance.
20 (*Id.* at ¶ 24.) This method of calculation allows for fair comparisons between dealerships of different
21 sizes across the state. (*Id.* at ¶ 10.)

22 23. Article 9 of the Dealer Agreement sets out clear terms by which Folsom Chevrolet's
23 performance will be evaluated and what action may be taken in the event of breach. It states that
24 "General Motors will provide Dealer with a written report at least annually . . . evaluating Dealer's
25 sales performance," and provides that "[s]atisfactory performance of Dealer's sales obligations under
26 Article 5.1 requires Dealer to achieve a Retail Sales Index equal or greater than 100." (R201.017 §
27 9.)
28

1 24. GM has been utilizing RSI since the late 1970s. (RT Vol. 2, 461:17-22 (Giguere).)
2 Though known by different names, RSI or some variant of it is used throughout the automotive
3 industry to measure dealer sales performance. (*See* RT Vol. 5, 20:11-21 (Farhat) (“The concept of
4 sales over expectation is fundamental.”).)

5 **D. Customer Satisfaction**

6 25. In addition to its provisions regarding sales performance, the Dealer Agreement also
7 contains requirements relating to customer satisfaction. The Dealer Agreement states that
8 “appropriate care for the customer will promote customer satisfaction with General Motors Products
9 and its dealers, which is critically important to our current and future business success.” (R201.011 §
10 5.3.)

11 26. Customer satisfaction is typically measured by GM using two metrics: Purchase and
12 Delivery Satisfaction (“PDS”), which relates to a customer’s experience during the purchase process
13 for a new vehicle, and Service Satisfaction Score (“SSS”), which relates to a customer’s experience
14 when their vehicle needs warranty repair or maintenance. (RT Vol. 1, 100:14-102:10 (Stinson).)
15 Dealerships receive separate scores for both PDS and SSS. (RT Vol. 1, 102:20-25 (Stinson).)

16 27. By signing the Dealer Agreement, Folsom Chevrolet agreed to “ensure that the
17 customer’s purchase and delivery experience are satisfactory” (R201.009 § 5.1.1(e)), “maximize
18 customer satisfaction by providing courteous, convenient, prompt, efficient and quality service to
19 owners of Motor Vehicles, regardless of from whom the Vehicles were purchased” (*id.* at 10 §
20 5.2.1), and “promote customer satisfaction with the purchase and ownership experience.” (*Id.* at 11 §
21 5.3.)

22 **E. Personal Services**

23 28. The Dealer Agreement contains several requirements relating to the Dealer Operator
24 personally, which is Mr. Crossan. (*See id.* at R201.045; RT Vol. 1, 57:10-16 (Stinson).) Specifically,
25 the Dealer Agreement is also a “Personal Services Agreement, entered into in reliance on the
26 qualifications, integrity of Dealer Operator . . . and on Dealer’s assurance that Dealer Operator will
27 provide personal services by exercising full managerial authority over Dealership Operations.”
28 (R201.006 § 2.) As a result, Mr. Crossan is “responsible for developing and implementing policies,

1 practices and procedures necessary for the Dealer to meet its obligations under this Agreement with
2 respect to sales, service, customer satisfaction, facilities, and capitalization.” (*Id.*)

3 **F. Inventory**

4 29. The Dealer Agreement requires dealerships “to purchase and stock . . . a mix of
5 models and series of Motor Vehicles . . . in quantities adequate to enable Dealer to fulfill its
6 obligations in its Area of Primary Responsibility.” (*Id.* at 14 § 6.4.1.) Because dealers are not
7 permitted to maintain an inventory of fleet vehicles, this requirement is specific to retail vehicle
8 inventory. (RT Vol. 2, 314:12-22 (Stinson).)

9 **G. Staffing**

10 30. By signing the Dealer Agreement, Folsom Chevrolet “agree[d] to . . . maintain an
11 adequate staff of trained sales personnel.” (R201.009 § 5.1.1(a).)

12 **H. Termination**

13 31. The Dealer Agreement is terminable at any time by Folsom Chevrolet alone. (*Id.* at §
14 14.1.) However, as outlined in Article 13, General Motors may terminate only upon a breach of the
15 Dealer Agreement. The Dealer Agreement expressly contemplates that if “Dealer has failed to
16 adequately perform its sales or service responsibilities, including those responsibilities relating to
17 customer satisfaction and training,” General Motors may begin the process which may lead
18 ultimately to termination. (*Id.* at § 13.2.)

19 32. The termination process includes a written notice of breach, followed by a six month
20 period to correct or cure the underlying failure(s). (*Id.*) Should Folsom Chevrolet fail to correct its
21 performance failures and remain “in material breach of its obligations at the expiration of the period,
22 General Motors may terminate th[e] Agreement by giving Dealer 90 days advance written notice.”
23 (*Id.*)

24 **II. TIMELINE OF RELEVANT EVENTS**

25 **A. 1992-2009: Folsom Chevrolet is Initially Successful**

26 **1. Folsom Chevrolet Begins Operating, with GM’s Assistance**

27 33. Mr. Crossan acquired the Folsom Chevrolet franchise in May 1992, with the support
28 of Motors Holding, a GM affiliate. (RT Vol. 6, 105:10-13 (M. Crossan).) Motors Holding provided

1 \$750,000 in initial capital, while Mr. Crossan invested \$250,000. (RT Vol. 6, 107:5-13 (M.
2 Crossan).) Mr. Crossan then slowly bought out Motors Holding with profits from the dealership,
3 culminating in full ownership in the final quarter of 1997. (RT Vol. 6, 109:3-21 (M. Crossan).)

4 34. Folsom Chevrolet opened in June 1992, taking over from a dealership which had
5 gone out of business the previous year. (RT Vol. 6, 102:25-103:10 (M. Crossan).) It was provided
6 space by GM within the Folsom Auto Plaza, "probably the nicest building built in all of Northern
7 California at that time." (RT Vol. 6, 110:8-111:5 (M. Crossan).) GMAC, a GM affiliate, had
8 financed the Auto Plaza location, and Mr. Crossan estimated that GMAC had lost "somewhere
9 around \$17 million" when the old dealership folded. (RT Vol. 6, 105:14-106:17 (M. Crossan).) GM
10 nonetheless provided Folsom Chevrolet with "\$780,000 worth of parts" from the previous dealership
11 to get started in its new business. (*Id.*)

12 35. In approximately 1997, Mr. Crossan, through a trust, purchased land in what is now
13 the Folsom Auto Mall. (RT Vol. 6, 113:5-9, 114:7-20 (M. Crossan).) Mr. Crossan initially estimated
14 the purchase cost of the property at \$3.8 or \$3.9 million, with the cost to construct the facility at "a
15 little over \$2 million." (RT Vol. 6, 114:24-115:5 (M. Crossan).) He later testified that it cost \$4
16 million to purchase the property, and "roughly \$3 million" to construct the facility. (RT Vol. 6,
17 146:8-147:4 (M. Crossan).) The entire project was financed by GMAC. (RT Vol. 9, 23:15-24:12 (M.
18 Crossan).)

19 2. Folsom Chevrolet's Early Years are Successful

20 36. Folsom Chevrolet moved into its present location in the Folsom Auto Mall in
21 approximately February 1998. (RT Vol. 6, 112:25-113:1 (M. Crossan).) Initially, the dealership was
22 successful. For example, from 2003 to 2005, Folsom Chevrolet sold more than 1,000 trucks alone
23 every year. (RT Vol. 8, 224:14-22 (M. Crossan).) Larry Crossan testified that the dealership sold as
24 many as 1,850 vehicles in one year during this time. (RT Vol. 8, 41:20-42:1 (L. Crossan).)

25 37. Despite the high sales overall, the dealership's fleet sales were lower than they are
26 today. (RT Vol. 8, 226:13-17, 227:14-17 (M. Crossan).) However, Folsom Chevrolet did sell a lot of
27 commercial (non-fleet) vehicles at the time, which count as retail sales. (RT Vol. 8, 226:18-227:13
28

1 (M. Crossan).) Mr. Crossan testified these sales “made a substantial impact on those truck numbers”:
2 “That was a big part of what we did.” (*Id.*)

3 38. During this time, the dealership carried more inventory than it does now. (RT Vol. 8,
4 89:12-18 (L. Crossan).) It also had more salespeople, maintaining four crews of seven salespeople
5 each, for a total of about 28. (RT Vol. 8, 89:23-90:2 (L. Crossan).) In addition, Folsom Chevrolet
6 had a functioning Business Development Center (“BDC”) operating from a single-wide trailer
7 behind the dealership, although it was later cut down significantly during the subsequent downturn.
8 (RT Vol. 6, 200:5-201:3 (M. Crossan); RT Vol. 8, 207:10-208:19.)

9 39. The early 2000s were the dealership’s high-water mark, as its truck sales began
10 declining in 2004. (RT Vol. 8, 227:25-228:3 (M. Crossan).) This was prior to the addition of any
11 geography, and five years prior to GM’s bankruptcy in June 2009. (RT Vol. 8, 228:4-7 (M.
12 Crossan).)

13 3. 2002-2005: The Crossans Operate a Shingle Springs Dealership

14 40. In 2002, Mr. Crossan and Larry Crossan purchased a Dodge Lincoln Mercury
15 dealership in Shingle Springs, California. (RT Vol. 8, 38:3-6 (L. Crossan).) That store closed within
16 three years, because “the sales were just not good.” (RT Vol. 8, 38:7-14 (L. Crossan).) Larry Crossan
17 testified that part of the problem was that a Dodge dealer opened up in the Folsom Auto Mall, and “a
18 large majority” of customers in Shingle Springs were driving “[r]ight by the Dodge store” in Shingle
19 Springs on their way to work. (RT Vol. 8, 80:5-25 (L. Crossan).)

20 B. 2009-2011: Folsom Chevrolet Agrees to Accept, and is Assigned, Additional 21 Territory Following Bankruptcy

22 1. 2009: Folsom Chevrolet Signs the Participation Agreements and Agrees 23 to Accept Additional Territory

24 41. In June 2009, in the midst of the Great Recession, General Motors Corporation, or
25 “Old GM,” faced a difficult decision. Ultimately, it was forced to declare bankruptcy. As the
26 company restructured, it made the decision to close hundreds of poor performing dealers in an
27 attempt to provide its remaining dealers with increased opportunity for sales and profits. Those
28 dealerships which were selected to remain, including Folsom Chevrolet, were sent proposed letter

1 agreements known as Participation Agreements. (R202.001 (June 1, 2009 Participation Agreement)
2 ("Participation Agreement").)

3 42. The Participation Agreements required dealers to recognize that given the
4 restructuring of the dealer network, the remaining dealers would have significant new opportunities,
5 but also new responsibilities:

6 Dealer recognizes that as part of GM's restructuring efforts, a
7 significant number of dealers of the same line make as Dealer will be
8 consolidated. **Because this consolidation will result in fewer dealers**
9 **representing the Existing Model Lines, the retained dealers,**
10 **including Dealer, will have the opportunity to increase sales**
11 **significantly.** It is therefore vital to Dealer and GM that **Dealer agree**
12 **to implement additional sales and inventory requirements**
13 **necessary for Dealer to be retained in the [new GM's] dealer network**
14 **and for Dealer's performance to be in line with such increased**
15 **opportunity.**

16 (*Id.* (emphasis added).) The Participation Agreement further stated:

17 2. Sales Performance. Dealer recognizes that, as a result of the
18 consolidation of GM dealers undertaken by GM to strengthen the
19 dealer network and increase dealer through-put, **Dealer has**
20 **substantially more sales opportunities and Dealer must**
21 **substantially increase its sales of new Motor Vehicles.**

22 (*Id.* at 2 (emphasis added).) The Participation Agreement also required dealerships to pledge to
23 increase new vehicle inventory "to meet the increased sales expectations." (*Id.*)

24 43. Mr. Crossan signed the Participation Agreement on behalf of Folsom Chevrolet on
25 June 4, 2009. (*Id.* at 9.) He also signed a follow-up letter sent a few days later, which reiterated these
26 themes:

27 **Given the overall consolidation of GM's dealer network, improved**
28 **and award winning product offerings by GM, and an anticipated**
improving US vehicle market over the next few years, **dealers will**
have significant opportunities to increase sales. These sales
increases are necessary to GM and the dealer networks' viability over
the long term. Our intent is to assist dealers as much as possible to sell
high quality vehicles and provide the best customer service in the
industry. **Our expectation for GM dealers is that they will perform**
to GM's sales and customer satisfaction requirements and, over
time, improve their sales performance in line with increased
market opportunities.

1 (R203.001 (June 9, 2009 Ltr. from M. LaNeve) (emphasis added).)

2 44. Mr. Giguere, who administers geography for all GM dealers in the United States,
3 testified that his understanding of the message being sent with the Participation Agreement was that
4 “[w]ith fewer dealers than we had before, the remaining dealers will need to generate more volume.
5 They’ll need to step up.” (RT Vol. 3, 132:22-133:4, 204:12-20 (Giguere).) Furthermore, “with some
6 of those dealers that had gone out, there certainly is additional opportunity available that had those
7 dealers remained, might not necessarily be available to the remaining dealers.” (RT Vol. 3, 204:21-
8 24 (Giguere).) It therefore should not have been a surprise to dealers when additional territory was
9 indeed assigned. (RT Vol. 3, 140:23-141:8 (Giguere).)

10 **2. 2010-2011: Folsom Chevrolet is Assigned Additional Territory and does**
11 **not Object**

12 45. Two Chevrolet dealers in Folsom’s area went out of business during the bankruptcy
13 process. (RT Vol. 3, 204:25-205:19 (Giguere).) Those dealerships were located in Shingle Springs
14 and in Jackson, east and south of Folsom proper. (*Id.*) Mr. Crossan learned that these dealerships
15 would not be going forward within about six months of receiving the Participation Agreement. (RT
16 Vol. 6, 169:10-22 (M. Crossan).)

17 46. In December 2010, General Motors notified Folsom Chevrolet that GM was issuing
18 new APR and AGSSA definitions in light of the “significant reduction in the number of dealers” in
19 its network post-bankruptcy. (*See* R204.001 (Dec. 17, 2010 Notice of Proposed APR and AGSSA
20 Changes).) The notice sent by GM proposed adding additional territory to Folsom Chevrolet’s
21 AGSSA, primarily to the east. (*Id.* at 5-11.) The new territory included several large but sparsely
22 populated tracts, some of which are located in the former Jackson dealer’s AGSSA. (*Id.*; *see also*
23 R290 (USAI Supplemental Rebuttal) at 1 (describing former Jackson AGSSA).) The dealership was
24 not assigned the town of Jackson itself. (RT Vol. 10, 62:11-18 (Farhat).)

25 47. The December 2010 notice advised Folsom Chevrolet that it was “provided pursuant
26 to Article 4.2” of the Dealer Agreement, and requested that Folsom Chevrolet provide it with “any
27 relevant information that you want GM to consider before making a final decision regarding this
28

1 matter.” (R204.001.) However, Folsom Chevrolet did not respond to the notice or provide relevant
2 information. (RT Vol. 8, 179:15-19 (M. Crossan).)

3 48. Yet it appears that other dealers did provide input. Accordingly, General Motors
4 provided another tentative notice of territory change taking into account the feedback it had
5 received, which again gave Folsom the opportunity to provide information for GM’s consideration
6 prior to a final decision being made. (RT Vol. 3, 154:19-25 (Giguere); R205 (Apr. 22, 2011
7 Tentative Decision of APR and AGSSA Changes).) But like before, Folsom Chevrolet did not
8 respond to that notice either. (RT Vol. 3, 155:9-11 (Giguere).)

9 49. As a result, General Motors finalized the new assignment on June 29, 2011. (R257
10 (June 29, 2011 Final Decision of APR and AGSSA Changes).) The first words on the notice sent to
11 Folsom Chevrolet state, in bold font:

12 **NOTICE TO DEALER: Your franchise agreement is being**
13 **modified or replaced. If the modification or replacement will**
14 **substantially affect your sales or service obligations or investment,**
15 **you have the right to file a protest with the NEW MOTOR**
16 **VEHICLE BOARD in Sacramento and have a hearing in which**
17 **you may protest the proposed modification or replacement of your**
18 **franchise under provisions of the California Vehicle Code. You**
must file your protest with the board within 30 calendar days of
your receipt of this notice or within 30 days after the end of any
appeal procedure provided by the franchisor or your protest
rights will be waived.

19 (*Id.*) Folsom Chevrolet did not file a protest to challenge the assignment of this new geography. (RT
20 Vol. 8, 180:3-16 (M. Crossan).)

21 **C. 2011-2013: Folsom Chevrolet Fails to Adapt to its New Territory**

22 **1. Folsom Chevrolet Makes no Real Changes to its Operations Following the**
23 **Recession**

24 50. By signing the Participation Agreement in 2009, Mr. Crossan and Folsom Chevrolet
25 had agreed to “implement additional sales and inventory requirements necessary for Dealer to be
26 retained in the [new GM’s] dealer network and for Dealer’s performance to be in line with such
27 increased opportunity.” (R202.001.) However, Folsom Chevrolet never changed its operations, and
28 as a result, did not rise to meet the new opportunities presented to it following the bankruptcy.

1 51. For example, under impeachment with his deposition transcript, Mr. Crossan
2 admitted that Folsom Chevrolet “didn’t change anything” about its operations upon receiving its new
3 geography. (RT Vol. 8, 183:14-21 (M. Crossan).) Larry Crossan was also impeached on this topic,
4 admitting that he testified in his deposition that the dealership’s response “[f]rom an operational
5 standpoint” was simply “[s]ell cars and sell trucks.” (RT Vol. 8, 83:1-4 (L. Crossan).) Larry Crossan
6 then claimed the dealership did start a BDC at this time (RT Vol. 8, 83:5-9 (L. Crossan)), but he was
7 contradicted by Marshal Crossan, who twice put the timeframe at 2014 or 2015. (RT Vol. 6, 202:2-4
8 (M. Crossan); RT Vol. 8, 208:20-22 (M. Crossan).) In any event, there were no additional
9 salespersons hired, and no specific pricing changes initiated. (RT Vol. 8, 83:10-18 (L. Crossan).)

10 **2. 2011: Folsom Chevrolet Fails to Take Advantage of the New Opportunity**
11 **Available to it**

12 52. The loss of two neighboring dealers resulted in an increase in opportunity for Folsom
13 Chevrolet. As a result, the number of sales GM expected Folsom Chevrolet to make increased as
14 well. Specifically, Folsom Chevrolet’s expected car sales went from 80 to about 220, while its
15 expected truck sales went from 200 to about 405. (RT Vol. 10, 39:14-40:1 (Stinson).) This increase
16 was broadly in line with other Northern California dealers who are RSI-effective today. (*See* R289
17 (Chart of Northern California Dealers); (RT Vol. 10, 40:14-17 (Stinson).)

18 53. However, unlike those other Northern California dealers, sales at Folsom Chevrolet
19 never really picked up following the recession. (RT Vol. 8, 42:25-43:2 (L. Crossan).) In fact, to date,
20 the dealership has never even reached the levels of sales it achieved in 2006. (RT Vol. 8, 43:14-16
21 (L. Crossan).) As a result, the dealership began achieving extremely low RSI numbers. In 2011, the
22 first year following the assignment of its new territory, Folsom Chevrolet’s RSI was only 45.1.

23 **3. 2012: Folsom Chevrolet Continues to Struggle**

24 54. The dealership fared no better in 2012, achieving only a 47.40 RSI, ranking just
25 123rd of 135 Chevrolet dealers in the state of California. (*See* R242A.002 (2012 Sales Performance
26 Review).) The dealership sold 373 vehicles against an expectation of 787, meaning it sold 414 fewer
27 vehicles than would be expected of a state-average dealer in 2012. (*Id.*) This expected level of sales
28 was well below what Folsom Chevrolet sold in the mid-2000s. (RT Vol. 8, 224:14-22 (M. Crossan).)

1 55. Among other issues, Folsom Chevrolet's customers were dissatisfied with the
2 dealership during this time. While its service scores rated above-average, Folsom Chevrolet's "top
3 box" PDS score was below the Zone, Region, and Division in 2012, indicating that customers were
4 not happy with the new vehicle purchasing experience. (See R268.006 (CSI Dealer Summary).) As a
5 result, the dealership's customer loyalty scores—which indicate what proportion of purchasers return
6 to the dealership for a second vehicle—were very low, consistently ranking below the District, Zone,
7 Region, and Nation. (R241A.001 (2012 Dealer Sales Loyalty Report).) This low level of customer
8 loyalty is concerning. (RT Vol. 2, 423:14-16 (Escalante).)

9 56. Folsom Chevrolet was, however, quite profitable, recording a profit of \$305,878 in
10 2012. (See R243A.001 (2012 Operating Report) at line 63.) It also paid Mr. Crossan a \$288,000
11 salary, as well as paying \$1,100,700 in rent and \$137,436 in taxes for properties owned by Mr.
12 Crossan. (R243A.002 at lines 8, 41, 45.) The dealership made much of its money by selling to fleet
13 customers, as its sold more trucks fleet (241) than retail (183), even as the fleet trucks earned a
14 higher gross profit per unit for the dealership than retail (\$1,541 vs. \$1,270). (R243A.005 at lines 41,
15 43.) All told, nearly half the dealership's new vehicle gross profit in 2012 came from fleet sales.
16 (P185 (Stockton Report) at 80, App. p. 12.)

17 **4. 2013: Folsom Chevrolet Fails to Meet RSI or Explain why its Territory is**
18 **Inaccurately Assigned**

19 a. Folsom Chevrolet Ranks Nearly Last in the State

20 57. Folsom Chevrolet continued to experience struggles with sales performance in 2013.
21 It made just 370 sales against an expectation of 904, a shortfall of 534 units. (R242B.002 (2013
22 Sales Performance Review).) Again, this expectation was less than Folsom's sales in the mid-2000s.
23 (RT Vol. 8, 224:14-22 (M. Crossan).) The result was an "unsatisfactory" RSI of 40.93, ranking it
24 129th of 133 dealers, nearly dead last in the state. (*Id.*)

25 58. The dealership's issues were largely similar to the previous year, including with
26 regards to customer satisfaction. It remained below average on the PDS measure of customer
27 satisfaction during new vehicle purchases. (R268.005.) And its customer loyalty measures continued
28 to rate lower than the District, Zone, Region, or National Averages. (R241B.001.) Further analysis

1 indicates that Folsom Chevrolet was primarily losing customers to its competitor Chevrolet dealers,
2 including John L. Sullivan (7 customers gained and 12 lost, for a net of -5), Maita Chevrolet (-6),
3 and Kuni Chevrolet (-4). (R241B.002; RT Vol. 2, 427:3-1 (Escalante).) Many Folsom Chevrolet
4 customers also defected entirely, with a net loss of 14 customers to Ford. (R241B.002; RT Vol. 2,
5 428:6-8 (Escalante).)

6 59. Once again, however, the dealership was profitable, recording a profit of \$157,922 in
7 2013. (*See* R243B.001 (2013 Operating Report) at line 63.) It continued to pay Mr. Crossan a
8 \$288,000 salary, and paid slightly more—\$1,140,100—in rent and \$46,411 in taxes for properties
9 owned by Mr. Crossan. (R243B.002 at lines 8, 41, 45.) The dealership continued to earn much of its
10 money by selling to fleet customers, as its again sold more trucks fleet (231) than retail (199), but
11 that year the dealership earned an unusually high gross profit per unit in retail (\$2,078). (R243B.005
12 at lines 41, 43.) As a result, approximately 41% of the dealership's new vehicle gross profit in 2013
13 came from fleet sales. (P185 (Stockton Report) at 80, App. p. 12.)

14 b. April 2013: Folsom Chevrolet Threatens to Protest the Change to its
15 Territory

16 60. On January 22, 2013, General Motors advised Folsom Chevrolet that it was
17 reassessing the territory assignments for every dealer in the network. (R206.001 (Jan. 22, 2013
18 Notice of Tentative Decision).) This action was undertaken as a result of nationwide updates to
19 census tract definitions made by the U.S. Census Bureau following the 2010 U.S. Census (*Id.*) The
20 effect of the updates by the Census Bureau were to subdivide some tracts assigned to Folsom
21 Chevrolet, increasing the total number from 60 to 74, but resulting in no real change to the actual
22 boundaries of the dealership's AGSSA. (RT Vol. 3, 159:25-162:13 (Giguere); *compare* R206.009
23 (then-Current AGSSA) *with* 11 (Proposed AGSSA).)

24 61. Nonetheless, the notice again advised Folsom Chevrolet that it was "provided
25 pursuant to Article 4.2" of the Dealer Agreement, and requested that Folsom Chevrolet provide it
26 with "any relevant information that you want GM to consider before making a final decision
27 regarding this matter." (R206.001.) Any such information was due "as soon as possible, but no later
28 than thirty (30) days from your receipt of this latter." (*Id.*) However, and like before, Folsom

1 Chevrolet did not respond to this notice or file an administrative protest within thirty days. (RT Vol.
2 8, 184:1-17 (M. Crossan).)

3 62. Mr. Crossan did send a letter to General Motors, but not until April 9, 2013—nearly
4 two months after the expiration of the contractual deadline to respond. (*See* R281.002.) In that letter,
5 Folsom Chevrolet objected to GM's purported "tentative decision to significantly expand Folsom
6 Chevrolet's APR and AGSSA." (*Id.*) However, the dealership had already been assigned the
7 geography at that point, approximately a year and a half earlier. (RT Vol. 8, 184:18-185:12 (M.
8 Crossan).)

9 63. The letter also provided a list of areas which Mr. Crossan asserted Folsom Chevrolet
10 should not be held responsible for. (R281.002.) Yet a map of those areas indicates that none were
11 within Folsom Chevrolet's existing AGSSA, meaning the dealership was *not* being assessed on sales
12 performance in those areas. (*See* R281.001 (mapping locations against AGSSA); RT Vol. 3, 164:5-
13 165:20 (Giguere).) Folsom Chevrolet nonetheless threatened that it would file a Protest with the
14 New Motor Vehicle Board if GM attempted to "revise our APR and AGSSA as proposed." (R281 at
15 3.) As noted above, Folsom Chevrolet filed no such protest.

16 64. Despite the lateness of the submission and the fact that it raised generally inapplicable
17 concerns, General Motors agreed to review Folsom Chevrolet's geography again. (*See* R207 (Apr.
18 10, 2013 Ltr. to M. Crossan).) Mr. Giguere was involved in the review. (RT Vol. 3, 167:10-11
19 (Giguere).)

20 65. Because Folsom Chevrolet had not identified concerns with any of the census tracts
21 assigned to its AGSSA, the first step for GM and Mr. Giguere was to attempt to identify or interpret
22 which assigned census tracts should be reviewed. (RT Vol. 3, 173:4-23 (Giguere).) Typically, in
23 those situations, GM will speak with the Zone Manager to get more information, and will also
24 review any perimeter tracts that might be implicated in the dealer's communication. (RT Vol. 3,
25 218:2-219:3 (Giguere).) In this case, because Mr. Crossan's letter had expressed concern with
26 communities to the west of the dealership (*see* R281.001), GM reviewed census tracts along Folsom
27 Chevrolet's western perimeter. (*Compare* R261 (April 10, 2013 Review Summary) (tract numbers
28 reviewed) *with* R206.011 (mapping tract numbers to Folsom Chevrolet's AGSSA).)

1 66. The results of the review are summarized in Exhibit R261, which provides drive
2 distance to the nearest dealership, drive time, and buyer behavior data for every tract considered.
3 (R261 (April 10, 2013 Review Summary).) The chart was compiled by an analyst, who identified
4 two census tracts which needed additional review and potential reassignment. (RT Vol. 3, 171:22-
5 172:6 (Giguere).) General Motors concurred with the analyst's assessment, and ultimately
6 reassigned those two tracts. (RT Vol. 3, 172:7-173:8 (Giguere).) However, GM determined that the
7 remaining tracts were appropriately assigned to Folsom Chevrolet. (R261.)

8 67. General Motors issued a revised tentative notice to Folsom Chevrolet which proposed
9 removing those two tracts from the fringes of the dealership's AGSSA. (R208 (May 31, 2013 Notice
10 of Proposed APR and AGSSA).) Because of the revisions, General Motors again reminded Folsom
11 Chevrolet of its opportunity to provide information to GM pursuant to Article 4.2 of the Dealer
12 Agreement. (*Id.* at 1.) Folsom Chevrolet did not respond to or provide any additional information in
13 response. (RT Vol. 8, 189:3-16 (M. Crossan).)

14 68. Hearing nothing further, on September 16, 2013, General Motors notified Folsom
15 Chevrolet that it had finalized its AGSSA assignment. (R209 (Sept. 16, 2013 Final Decision of APR
16 and AGSSA).) The first words on the notice sent to Folsom Chevrolet again stated, in bold font, that
17 it had the right to file a protest. (*Id.*) However, despite its earlier threat, Folsom Chevrolet did not file
18 a protest in response to the changes in its AGSSA. (RT Vol. 8, 189:17-190:2 (M. Crossan).)

19 **D. 2014: Folsom Chevrolet is Placed in the Performance Improvement Program**
20 **due to Sustained Underperformance**

21 **1. Jan. / Feb. 2014: Saul Escalante Begins Calling on Folsom Chevrolet**

22 69. In 2014, after years of underperformance in both RSI and CSI, General Motors began
23 taking steps to assist Folsom Chevrolet improve its performance. In January or February of that year,
24 District Sales Manager Saul Escalante, newly assigned to the Sacramento area, began calling on the
25 dealership to offer his assistance. (RT Vol. 2, 370:22-371:15 (Escalante).) Mr. Escalante would
26 proceed to visit the dealership in person nearly *every week* for the next four years—roughly 200
27 times in total. (RT Vol. 2, 373:5-21 (Escalante).)

1 70. Mr. Escalante said that this frequency of visits is “very high compared to the rest of
2 the stores or dealers that I call on.” (RT Vol. 2, 373:8-11 (Escalante).) Mr. Escalante testified that he
3 visited so often because he “became very interested in helping them improve their sales and their
4 customer satisfaction scoring.” (RT Vol. 2, 373:12-15 (Escalante).)

5 **2. March 2014: Folsom Chevrolet Finishes Renovations**

6 71. Starting in 2013, Folsom Chevrolet performed renovations on its facility, at a cost Mr.
7 Crossan estimated to be approximately \$800,000 to \$900,000. (RT Vol. 9, 30:1-7 (M. Crossan).) The
8 construction took approximately six months. (RT Vol. 6, 121:4-8 (M. Crossan).) Mr. Crossan has
9 asserted at various times, including in writing, that construction was not finished until “late 2014.”
10 (*See, e.g.*, R226.002.) However, a letter sent by the dealership in March 2014 demonstrates that
11 construction was finished earlier than Mr. Crossan claims. (R287 (March 13, 2014 Ltr.)) The letter
12 is from Larry Crossan to Gensler, architects working with GM to remodel dealership facilities. (RT
13 Vol. 9, 33:1-12 (M. Crossan).) The letter from Folsom Chevrolet states that “[a]s the pictures
14 indicate, construction is complete.” (R287.) It is therefore clear that construction was complete by no
15 later than March 13, 2014.

16 72. Mr. Crossan noted that at the time that letter was sent, the dealership was still missing
17 a sign. (RT Vol. 9, 49:10-50:24 (M. Crossan).) However, that sign was installed within the next six
18 to eight weeks. (*Id.*) Furthermore, it was not the “big arch sign” that marks the presence of a
19 Chevrolet dealership, but a smaller one—in fact, this was a brand sign that Folsom Chevrolet had
20 never previously had installed at the facility at all. (RT Vol. 9, 49:10-50:15 (M. Crossan).)

21 **3. June 2014: Folsom Chevrolet is Placed in the Performance Improvement**
22 **Program and Receives Additional Resources and Support**

23 73. On June 10, 2014, following years of underperformance in both sales and customer
24 satisfaction, Folsom Chevrolet was placed in GM’s performance improvement program. (R211 (June
25 10, 2014 Ltr.); RT Vol. 1, 113:10-16 (Stinson); RT Vol. 2, 371:25-372:8 (Escalante).) As part of the
26 process, Folsom Chevrolet was visited quarterly by its Zone Manager, Mike Stinson, and Mr.
27 Escalante, who talked through Folsom Chevrolet’s concerns and offered advice for how the
28 dealership could improve. (RT Vol. 1, 112:20-113:1 (Stinson).) Occasionally, District Service

1 Manager Leonard Deprez would join the meetings as well. (RT Vol. 1, 112:20-113:1 (Stinson).)

2 These meetings were in addition to Mr. Escalante's weekly visits. (RT Vol. 1, 113:2-9 (Stinson).)

3 74. On the same day, General Motors presented an in-depth analysis of Folsom
4 Chevrolet's operations, known as a POP meeting, at the dealership. (RT Vol. 1, 123:8-15 (Stinson).)
5 The analyses compares a dealership's financial data versus two composite sets of other dealers: the
6 13 other Chevrolet dealers in the Sacramento market, and the 80 best Chevrolet dealers in the
7 Western Region. (RT Vol. 1, 115:12-116:1 (Stinson); R263.014 (POP Report).) Mr. Stinson attended
8 the meeting, along with Mr. Escalante, Mr. Deprez, and Steve Griffin, a Chevrolet Dealer Network
9 Manager for the Western Region. (RT Vol. 1, 122:16-122:22, 118:3-5 (Stinson).)

10 75. The goal of the POP meeting was to find ways for Folsom Chevrolet to improve its
11 operations by spotlighting potential issues. (RT Vol. 1, 116:9-20 (Stinson).) It lasted approximately
12 four hours. (RT Vol. 1, 123:16-17 (Stinson).) The POP Report revealed a number of ways in which
13 the dealership was an outlier compared to the composite groups:

- 14 • **Used/New Vehicles Sales:** The dealership sold nearly twice as many used cars as new
15 cars, while the industry standard is 1:1. (R263.013; RT Vol. 1, 124:7-126:8 (Stinson).)
- 16 • **Rent:** Folsom Chevrolet pays significantly more in rent per new unit—more than two
17 thousand dollars more, on average—than do the composite groups, even the composite
18 made up of other Sacramento dealers. (R263.015.) Mr. Stinson testified this rent is
19 “really high,” particularly since it is going solely to Mr. Crossan as the landlord. (RT Vol.
20 1, 126:14-127:13 (Stinson).)
- 21 • **Total Retail Sales:** Folsom Chevrolet sells hundreds of fewer retail vehicles per year
22 than do the composite groups, again including the composite made up of other
23 Sacramento dealers. (R263.030; RT Vol. 1, 129:1-21 (Stinson).)
- 24 • **Gross Profits:** Starting in 2013, Folsom Chevrolet began earning (or keeping)
25 significantly more gross profit per new retail vehicle than the composite groups.
26 (R263.038; RT Vol. 1, 129:22-130:25 (Stinson).) Mr. Stinson testified that higher gross
27 profit typically leads to fewer sales. (RT Vol. 1, 131:1-22 (Stinson).) The gross profit was
28 particularly high on new trucks, the area where Folsom Chevrolet experiences the
greatest shortfall. (R263.039; RT Vol. 1, 132:6-132:15 (Stinson).)

24 In addition, even excluding fleet units, Folsom Chevrolet earned thousands more in
25 variable gross profit per new unit than the composites. In 2013, the dealership earned
26 \$8,361 per unit, versus \$5,098 and \$5,351 for the composite groups. (R263.079; RT Vol.
1, 134:4-15 (Stinson).)

- 27 • **PDS:** The dealership was below the Zone and Region average in PDS for the prior two
28 years. (R263.133; RT Vol. 1, 136:2-137:2 (Stinson).)

- 1 • **Sales Compensation per Retail Unit:** The dealership paid its salesmen an unusually
2 high amount of compensation on each sale compared to the composite groups,
3 particularly for new vehicles. (R263.069; RT Vol. 2, 278:4-11 (Stinson).)
- 4 • **Retail Sales per Expected:** The dealership was making only a fraction of the sales
5 expected given the opportunity available to it, while both composite groups exceeded
6 their expected sales easily. (R263.150; RT Vol. 1, 137:21-138:15 (Stinson).)
- 7 • **Losses vs. Competitors:** An email from Mr. Griffin, sent during the run-up to the POP
8 meeting, indicates that General Motors was also concerned because the Ford dealer in the
9 Folsom Auto Mall was outselling Folsom Chevrolet 4:1, and the Chrysler dealer was
10 outselling them 3:1. (R210.) In fact, Ford made over 1600 retail sales in 2013, the
11 previous year, while Chrysler made 1200. (*Id.*; RT Vol. 1, 118:25-119:5 (Stinson).)
12 Folsom Chevrolet, meanwhile, had made just 370 retail sales against an expectation of
13 904. (R242B.002 (2013 Sales Performance Review).)

14 76. Around this time, GM also paid for Folsom Chevrolet to receive assistance from a
15 third party consultant, Maritz. (RT Vol. 1, 139:1-141:8 (Stinson).) Mr. Stinson personally selected
16 Folsom Chevrolet to receive this assistance because he believed it would help them improve their
17 business and better capture the opportunity available to them. (*Id.*) GM continues to pay for Maritz
18 to visit the dealership today. (*Id.*)

19 77. By the second meeting in August 2014, Mr. Stinson had identified and investigated a
20 key component of Folsom Chevrolet's struggles: its use of inventory to make lucrative fleet sales.
21 (RT Vol. 1, 146:13-147:4, 149:1-151:1 (Stinson); Vol. 2, 283:22-284:16 (Stinson).) Typically, fleet
22 customers order vehicles through dealers to be built by GM, and receive their vehicles in 6-8 weeks.
23 (RT Vol. 1, 147:15-148:25 (Stinson).) However, Folsom Chevrolet was simply selling their existing
24 retail units to those fleet customers, which takes time to be replenished. (RT Vol. 1, 149:1-151:1
25 (Stinson).) The result is that "instead of the fleet customer waiting 6 to 8 weeks for that unit . . . the
26 [retail] customer then wait[s] 6 to 8 weeks for those vehicles to be in the retail inventory." (*Id.*)

27 78. Once GM learned of these practices in 2014, Mr. Escalante began requesting the
28 dealership halt its practice of selling and trading retail units for fleet customers, protesting to
29 Marshal Crossan, Larry Crossan, and former employee David Shirley. (RT Vol. 2, 443:3-15
30 (Escalante); *see also* RT Vol. 2, 398:10-14 (Escalante) ("I fought it for so long.")). GM also
31 suggested that Folsom Chevrolet increase its inventory to combat the imbalance created by this
32 practice. Thus, part of the business plan reviewed at the August 4, 2014 quarterly meeting involved
33 Folsom Chevrolet "Increas[ing] inventory levels by 30% in key segments, Silverado, Cruze, and

1 Malibu.” (R212.002.) The dealership also committed to fully implementing a BDC, which at that
2 time was ongoing. (*Id.*) However, as described below, both the use of inventory for fleet sales and
3 the BDC would continue to be problematic for the dealership for years.

4 **4. 2014 Results: Folsom Chevrolet Fails to Meet Dealer Agreement**
5 **Requirements**

6 79. Despite GM’s assistance, Folsom Chevrolet failed to meet its obligations for both
7 sales and customer service in 2014. On the sales side, Folsom Chevrolet made 428 sales against an
8 expectation of 963, a shortfall of 535 units. (R242C.002 (2014 Sales Performance Review).) The
9 result was an “unsatisfactory” RSI of 44.44, ranking it 124th of 128 dealers, again nearly last in the
10 state. (*Id.*) Once again, this expectation was less than the sales made by Folsom Chevrolet in the
11 mid-2000s. (RT Vol. 8, 224:14-22 (M. Crossan).)

12 80. With regards to customer satisfaction, Folsom Chevrolet fell backwards considerably.
13 It remained below average on the PDS measure of customer satisfaction during new vehicle
14 purchases. (R268.004.) However, unlike prior years, it also performed extremely poorly on the SSS
15 measure relating to service satisfaction, scoring just a 65.4, compared to the prior year’s score of
16 83.1. (*Id.* at 5.) Evidence at the hearing confirmed that 65 represents a low score. (RT Vol. 1,
17 156:22-25 (Stinson); RT Vol. 2, 356:6-7 (Deprez).)

18 81. Meanwhile, Folsom Chevrolet’s customer loyalty measures continued to rate lower
19 than the District, Zone, Region, or National Averages. (R241C.001.) The dealership’s loyalty rate
20 bottomed out in early 2014, reaching as low as 5 to 6 percent—meaning only 1 in 20 customers who
21 purchased a vehicle from Folsom Chevrolet were returning to purchase there again. (RT Vol. 2,
22 429:15-24 (Escalante).) Data indicates that many of those customers were going to other Chevrolet
23 dealers in the area, particularly John L. Sullivan and Maita Chevrolet. (R241C.002.) The number one
24 model of vehicle those defecting customers purchased—27 total, as many as the next three models
25 combined—was the Chevrolet Silverado. (*Id.*)

26 82. The dealership remained profitable, recording a profit of \$115,499 in 2014. (*See*
27 R243C.001 (2014 Operating Report) at line 63.) It continued to pay Mr. Crossan a \$288,000 salary,
28 paid slightly more—\$1,143,600—in rent, and paid \$70,400 in taxes for properties owned by Mr.

1 Crossan. (R243C.002 at lines 8, 41, 45.) The dealership continued to earn much of its money by
2 selling to fleet customers, as it sold far more fleet trucks (408) than retail (256), although Folsom
3 Chevrolet again held out for an unusually high gross profit per unit in retail (\$1,914). (R243C.005 at
4 lines 41, 43.) More than half of the dealership's new vehicle gross profit in 2014 came from fleet
5 sales. (P185 (Stockton Report) at 80, App. p. 12.)

6 **E. 2015: Folsom Chevrolet Fails to Improve and Receives a Notice of Breach and**
7 **Accompanying Cure Period**

8 **1. Jan.-May 2015: GM Continues to Offer Additional Assistance**

9 83. Throughout 2015, General Motors continued to offer resources and assistance to
10 Folsom Chevrolet, in the form of weekly visits from Mr. Escalante, quarterly meetings with Mr.
11 Stinson and other GM representatives, and counseling by Maritz. In addition, Mr. Stinson and Mr.
12 Escalante also went out of their way to assist the dealership informally. For example, on April 13,
13 2015, Mr. Stinson was notified that a company was holding an electric vehicle event in Sacramento,
14 and referred the company to Folsom Chevrolet to help them showcase their electric cars. (R219.001)
15 Similarly, a May 28, 2015 e-mail from Mr. Stinson to Mr. Crossan shows Mr. Stinson referring a
16 potential customer for a Chevy Silverado to Folsom Chevrolet. (R282.001.)

17 **2. May 2015: GM Issues Notice of Breach and Provides Supplemental**
18 **Allocation for the Cure Period**

19 84. Despite GM's considerable efforts to assist Folsom Chevrolet before and during
20 2015, the dealership nonetheless failed to materially improve its performance. As a result, in May
21 2015, after months of fruitless efforts, General Motors delivered a letter to Mr. Crossan informing
22 him that Folsom Chevrolet was in breach of its obligations under the Dealer Agreement. (*See* R221
23 (May 19, 2015 Ltr. to M. Crossan) ("Notice of Breach").) The Notice of Breach advised Folsom
24 Chevrolet that its sales and customer satisfaction performance were below the levels required by the
25 Dealer Agreement, and provided a six-month period for Folsom Chevrolet to cure the breaches. (*Id.*)
26 The letter was hand-delivered by Mr. Stinson. (RT Vol. 1, 159:18-22 (Stinson).)

27 85. Along with the Notice of Breach, General Motors offered supplemental allocation to
28 Folsom Chevrolet—an additional allotment of new Chevrolet vehicles that could provide an

1 immediate sales boost, as well as driving further allocation in the future. (*See* P130-003 (May 27,
2 2015 Supplemental Allocation Worksheet).) Folsom Chevrolet was provided supplemental
3 allocation of up to 115 new Chevrolet vehicles, including “hot” models. (*Id.*)

4 86. There was some uncertainty at the hearing regarding the timing of when the
5 supplemental allocation arrived. For example, Mr. Crossan testified that the order was placed by
6 June 1, 2015, and it took “almost 2-1/2 months before we got all that type of inventory in.” (RT Vol.
7 7, 229:22-230:11 (M. Crossan).) That would put the date of receipt in mid-August, which aligns with
8 a quarterly contact letter written by Mr. Stinson in which he describes the majority of the
9 supplemental allocation arriving by the time of the meeting—August 18, 2015. (R231.001-2; *see*
10 *also* R229.003 (Aug. 21, 2015 Ltr.) (“Supplemental Allocation Discussion: All of the units ordered
11 should arrive in August 2015”).) It also aligns with the dealership-produced “Retail v. Fleet” chart,
12 which shows a large increase in retail units in August 2015. (R264.) And it further aligns with notes
13 taken by Saul Escalante on July 21, 2015, which stated that “[m]ost” of the “product . . . appears to
14 be coming in Late August.” (R254.)

15 87. Drew Crossan nonetheless testified that the supplemental allocation did not arrive
16 until September or October, although he conceded that “it was rolled in with our normal allocation”
17 and so “we didn’t have any ability to distinguish between the two.” (RT Vol. 9, 134:5-22 (D.
18 Crossan).) In any event, it is undisputed that Folsom Chevrolet never requested an extension of the
19 cure period, whether for the purportedly late arrival of supplemental allocation or any other reason.
20 (RT Vol. 9, 75:4-76:1 (M. Crossan).) Furthermore, the dealership’s monthly sales numbers do not
21 reflect any particular trend during this time, as sales were roughly flat between August and
22 November 2015, and notably low in the beginning of 2016. (*See* R270.)

23 **3. Cure Period: Folsom Chevrolet Finally Begins Making Changes, but**
24 **They are too Little, too Late**

25 a. The Dealership Finally Lets go of David Shirley

26 88. Following receipt of the Notice of Breach, Folsom Chevrolet finally began taking
27 action to address some of the issues plaguing the dealership, but its efforts were too little, too late.
28 For example, at some point in 2015, Folsom Chevrolet finally let go of its longtime General Sales

1 Manager, Mr. David Shirley. (RT Vol. 8, 135:1-12 (M. Crossan); RT Vol. 2, 418:11-16 (Escalante)
2 (Mr. Shirley still employed by the dealership as of April 30th, 2015).) Mr. Shirley often frustrated
3 progress at the dealership, as he would agree to tasks during Maritz meetings—such as creating a
4 BDC, hiring a CSI manager, or reviewing leads and manifest lists—he then failed to implement. (RT
5 Vol. 2, 410:21-412:13 (Escalante).) According to Mr. Crossan, by the time Mr. Shirley was let go,
6 he had openly stopped doing his job; “he was not engaging in the way that he was supposed to.” (RT
7 Vol. 8, 135:13-136:4 (M. Crossan).)

8 89. Mr. Escalante testified to a conversation between himself, Mr. Stinson, and Mr.
9 Crossan, in which the GM representatives suggested that “a new general sales manager would be a
10 possibility to help improve operations at the dealership.” (RT Vol. 2, 413:3-17 (Escalante).) But it
11 took quite some time after that for Folsom Chevrolet to act, as the conversation occurred was “way
12 before [Mr. Shirley] was fired.” (*Id.*) It appears even Mr. Shirley agreed Folsom Chevrolet acted
13 slowly; when he was fired, he told Mr. Crossan that he “should have let him go six months earlier.”
14 (RT Vol. 8, 136:5-11 (M. Crossan).)

15 90. The dealership saw immediate benefits after Mr. Shirley was finally let go. Drew
16 Crossan testified that when he started out, “all the marketing was running through David Shirley.”
17 (RT Vol. 9, 142:2-23 (D. Crossan).) When Folsom Chevrolet finally brought in an outside company,
18 Drew Crossan described it as “[o]ne of the biggest changes” and “a turning point.” (*Id.*) It also
19 permitted the dealership to revamp its Internet presence. Drew Crossan admitted, under
20 impeachment with his deposition transcript, that “once David left, it kind of opened up the doors” to
21 revamping the dealership’s website, and he “[a]bsolutely” noticed a positive change at that time. (RT
22 Vol. 9, 157:19-158:20 (D. Crossan).) Phone calls and leads both increased following that change,
23 and sales have picked up since then. (RT Vol. 9, 158:18-159:2 (D. Crossan).)

24 b. The Dealership Finally Begins Discounting its Vehicles

25 91. Folsom Chevrolet also began a successful pickup truck promotion—10% off MSRP
26 for Silverados—at the start of the cure period. (RT Vol. 9, 142:24-143:2 (D. Crossan).) According to
27 Drew Crossan, the promotion “[a]bsolutely” had an impact in sales, as well as a longer-term effect of
28 increasing the dealership’s sales rate and therefore its available inventory. (RT Vol. 9, 135:6-136:18

1 (D. Crossan).) He further testified: “what we found is that as your inventory grows . . . the customers
2 will come. So as our inventory has grown, more people will see it and more people come to it.” (*Id.*)
3 Mr. Crossan confirmed that the promotion “basically worked, because during this period of time, we
4 started to increase the truck sales.” (RT Vol. 7, 221:20-223:1.) He further stated that “[t]he number
5 of trucks that we had sold obviously jumped substantially over that period of time.” (RT Vol. 7,
6 224:18-225:1 (M. Crossan).)

7 c. The Dealership Fails to Implement an Effective BDC

8 92. Folsom Chevrolet’s aggressive promotion on Silverados and decision to let go of Mr.
9 Shirley were positive changes. However, they were undermined by its failure to fully implement
10 other suggestions. Chief among these was Folsom Chevrolet’s inability to staff a fully functional
11 BDC, which, as discussed further below, is critical to a modern dealership. Setting up a BDC and
12 setting appointments was the primary advice of the Maritz consultants who called on Folsom
13 Chevrolet. (RT Vol. 2, 410:1-411:11 (Escalante).)

14 93. It was also a frequent topic of conversation between Mr. Escalante and Folsom
15 Chevrolet. In fact, Mr. Escalante grew so frustrated by the dealership’s poor follow-through that he
16 kept notes of discussions from several meetings in July and August 2015. (R254; RT Vol. 2, 382:3-
17 382:22 (Escalante).) The notes reflect that on July 10th, the dealership had no BDM (BDC
18 Manager), and he spoke with Mr. Crossan about adding one. (R254.) Mr. Escalante further stated
19 that “[t]he current poor appointment rates followed by challenged sales seems to be the primary
20 reason traffic is so slow.” (*Id.*) Notes from the following two weeks indicate that no BDM was hired,
21 and “[n]o ETA” was offered as to when one would be hired.” (*Id.*)

22 94. These conversations occurred during the cure period, when the dealership should
23 have felt a sense of urgency to hire a BDM. (RT Vol. 2, 384:1-7 (Escalante).) Mr. Escalante also
24 noted that he had similar discussions both before and after those dates. (RT Vol. 2, 384:8-19
25 (Escalante).)

26 d. The Dealership Fails to Reform its Fleet Practices

27 95. In addition to its failure to implement a BDC, Folsom Chevrolet also failed to
28 reform—or even try to reform—its fleet practices during the cure period. In fact, Mr. Schoonbrood

1 testified that neither Marshal nor Larry Crossan have asked him to change the fleet department's
2 operations within the last five years. (RT Vol. 9, 209:16-20 (Schoonbrood).) As a result, the
3 dealership's inventory became increasingly imbalanced, towards fleet-type units—and away from
4 the most attractive inventory.

5 96. For example, Mr. Stinson noted in a January 2015 meeting that the dealership had
6 enough vehicles in inventory overall to meet its sales goals. (R217.002.) However, it became
7 apparent upon closer inspection that the overall inventory numbers were hiding “pockets of
8 deficiency” in key vehicle lines like Silverado. (RT Vol. 1, 146:5-12 (Stinson).) In fact, Mr. Stinson
9 called the number of Silverados at this time a “glaring” problem for the dealership. (RT Vol. 2,
10 295:16-24 (Stinson).)

11 97. The “Retail vs. Fleet” chart produced by Folsom Chevrolet confirms that inventory
12 imbalance was a major issue around the time of the cure period. (R264.) In June 2015, the dealership
13 had just 96 retail units in stock, against 297 units earmarked as “fleet.” (*Id.*) This ratio is “unusually
14 highly skewed towards fleet units.” (RT Vol. 2, 392:18-24 (Escalante).) Other Business Elite dealers
15 more typically carry around 7-9% fleet-type units. (RT Vol. 2, 394:5-13 (Escalante).) Folsom
16 Chevrolet argued in response that the chart includes some vehicles which were true fleet orders—
17 such as vehicles sold to Solar City—but it is clear that such orders cannot represent the entirety of
18 that category, as the number of fleet units remains high across 2014-2016. (R264; RT Vol. 6,
19 240:15-241:17 (M. Crossan).)

20 4. July 2015: Folsom Chevrolet Again Disclaims its Assigned Territory

21 98. In July 2015, during the cure period, Mr. Crossan wrote another letter, this time to
22 Mr. Sullivan, the Regional Director. (R226 (July 14, 2015 Ltr.)) Mr. Crossan referenced the
23 concerns he made in his April 2013 letter, and stated that “the recent expansion of our APR and
24 AGSSA” had increased its sales expectations to unsustainable levels. (*Id.*) However, it had been
25 nearly four years since that territory was first assigned to Folsom Chevrolet. (RT Vol. 8, 190:17-
26 191:5 (M. Crossan).) It was also nearly two years after GM's September 2013 modification to its
27 AGSSA. (RT Vol. 8, 190:10-16 (M. Crossan).) And of course, the expectation was less than Folsom
28 Chevrolet's sales in the mid-2000s. (RT Vol. 8, 224:14-225:1 (M. Crossan).) General Motors

1 nonetheless reviewed the dealership's territory once again, and confirmed it was correctly
2 configured. (R230 (Aug. 21, 2015 Ltr.)) Mr. Giguere was also involved in that review, and
3 determined that "no changes were necessary to the dealer's geography." (RT Vol. 3, 180:16-24
4 (Giguere).)

5 99. The July 2015 letter is noteworthy because it contains admissions by Mr. Crossan that
6 its fleet department activities were harming its retail sales. Specifically, Mr. Crossan stated that "our
7 large number of fleet sales diminishes our inventory levels and adversely impacts our ability to make
8 additional retail sales." (R226.002.) He also described Folsom Chevrolet as "a victim of its own
9 success as an elite GM fleet sales dealership," because "we consistently struggle to maintain the
10 inventory necessary to achieve our *retail* sales goals." (*Id.*) As Mr. Crossan put it during his
11 testimony, "we had been asking for additional inventory to help in that particular case because . . .
12 some of what would be considered a custom fleet that had been [*sic*] impacting our total sales." (RT
13 Vol. 8, 192:18-193:4 (M. Crossan).) Again, however, there were no internal requests to Mr.
14 Schoonbrood at this time to change his practices. (RT Vol. 9, 209:16-20 (Schoonbrood).)

15 100. The letter further states that "GM currently has the best product line I've seen in my
16 23 years as a Chevrolet dealer." (R226.002.) It also notes that Folsom Chevrolet has "increased our
17 sales staff to 12" and intended "to grow this number to 18." (*Id.*)

18 **5. August 2015: GM Holds a Meeting with Mr. Crossan at the Regional**
19 **Office**

20 101. As a final push, GM held a meeting with Mr. Crossan at the Chevrolet Regional
21 Office in Westlake Village, California, on August 18, 2015. (R231; RT Vol. 1, 176:5-12 (Stinson).)
22 GM representatives present included Mr. Stinson, Mr. Escalante, Mr. Dale Sullivan, the former
23 Director of the Western Region, and Mr. Robert Secrest—head of Business Operations for the West
24 Region, across all line-makes. (RT Vol. 1, 173:19-24 (Stinson).) The letter memorializing this
25 meeting notes that the dealership was well behind on its sales goals at the time, selling only 45 units
26 per month against a goal of 84. (R231.002.) In addition, it had no CSI manager. (R231.003.)

27 102. The meeting was convened because, after one year, "we needed him to be at average,
28 which is 100," but "we were still not seeing the immediate improvement." (RT Vol. 1, 173:25-

1 174:16 (Stinson).) Furthermore, Chevrolet wanted “to get Marshal’s viewpoint on current state of
2 affairs as well.” (*Id.*) However, the meeting was also convened to impress upon Mr. Crossan the
3 seriousness of his underperformance. (RT Vol. 6, 221:21-222:3 (M. Crossan).) It appears the
4 meeting was successful in that regard—Mr. Crossan described it as a “motivator” (*id.*)—but the
5 dealership nonetheless still failed to remedy its breaches during the cure period.

6 **6. October 2015: GM Renews Folsom Chevrolet’s Dealer Agreement**

7 103. Near the end of 2015, Folsom Chevrolet’s Dealer Agreement came due for renewal.
8 Folsom Chevrolet was still in its cure period with the possibility to improve, so General Motors
9 provided it with the opportunity to renew its Dealer Agreement. (R232; RT Vol. 1, 176:22-177:14
10 (Stinson).) However, the renewal letter explicitly noted that “Dealer is not meeting its obligations
11 under the Dealer Agreement,” and that “General Motors is not forgiving or releasing Dealer from its
12 obligations or responsibilities under the current or replacement Dealer Agreement, and is not
13 waiving any rights GM may have for Dealer’s fail[ure] to satisfy its obligations under the current or
14 replacement Dealer Agreement.” (R232.) Folsom Chevrolet agreed to renew its Dealer Agreement at
15 the time. (R201.001.)

16 **7. 2015 Results: Folsom Chevrolet Fails to Meet its Obligations Under the** 17 **Dealer Agreement, for Both the Whole Year and the Cure Period**

18 104. Despite GM’s continuing assistance and the changes it made during the cure period,
19 Folsom Chevrolet unfortunately failed to meet its obligations for sales and customer service in 2015,
20 whether judging by the entire year or just the cure period. On the sales side, Folsom Chevrolet made
21 652 sales against an expectation of 1,142, a shortfall of 490 units. (R242D.002 (2015 Sales
22 Performance Review).) The result was an “unsatisfactory” RSI of 57.09, ranking it 115th of 131
23 Chevrolet dealers in California. (*Id.*) During the cure period, it achieved an RSI of 64.7. (R238.002.)

24 105. Folsom Chevrolet’s customer satisfaction continued to be an issue as well. Although
25 its SSS scores improved, it declined in PDS for the second consecutive year, remaining below the
26 Zone, Region, and Division averages. (R268.003.) Its CSI scores during the cure period specifically
27 were also below Region average. (R238.003.) Folsom Chevrolet’s customer loyalty measures
28 improved somewhat from its 2014 low, but generally continued to rate lower than the District, Zone,

1 Region, or National Averages. (R241D.001.) Perhaps due to the dealership's newly-aggressive
2 pricing, it did conquest more Silverado purchasers than it lost. (R241D.002.)

3 106. The dealership also improved considerably on its profitability, recording a profit of
4 \$1,489,461 in 2015. (See R243D.001 (2014 Operating Report) at line 63.) It continued to pay Mr.
5 Crossan a \$288,000 salary, as well as \$1,143,600 in rent, and paid \$74,605 in taxes for properties
6 owned by Mr. Crossan. (R243D.002 at lines 8, 41, 45.) The dealership earned the highest percentage
7 of its gross profit through fleet sales yet, selling more fleet trucks (434) than retail (416), and at a
8 higher gross profit per unit (\$1,744 vs. \$1,491). (R243D.005 at lines 41, 43.) In addition, thanks to
9 the Solar City sale referred by GM, Folsom Chevrolet made 556 fleet car sales against 194 retail car
10 sales, earning nearly \$500,000 in gross profit from those fleet car sales alone. (*Id.* at lines 20, 20.)
11 All told, the dealership's fleet department earned \$1,247,792 in gross profits in 2015, approximately
12 58% of its total. (P185 (Stockton Report) at 80, App. p. 12.)

13 **F. 2016: Folsom Chevrolet is Given Additional Time, but Fails to Improve**

14 107. The cure period expired on December 31, 2015. (R234.001 (Jan. 25, 2016 Ltr. to M.
15 Crossan).) Following the expiration of the cure period, General Motors twice decided to provide
16 Folsom Chevrolet with additional time in which to improve. (R235 (June 8, 2016 Ltr. to M.
17 Crossan); R236 (Sept. 14, 2016 Ltr. to M. Crossan).) Again, however, despite General Motors'
18 assistance, the dealership failed to appreciably improve its performance. During the first half of
19 2016, its RSI fell to 56.55. (R238.002.)

20 **1. June & October 2016: Folsom Chevrolet Commits Service and Safety**
21 **Violations**

22 108. In June 2016, Folsom Chevrolet performed warranty engine work on a Corvette that
23 resulted in "catastrophic engine damage" due to an issue with improper tolerances. (R240; RT Vol.
24 2, 363:6-365:18 (Deprez).) Investigation revealed this was likely an issue with the work performed
25 by the technician. (*Id.*) Then, in October 2016, Folsom Chevrolet sold two vehicles that were subject
26 to mandatory recalls for defective airbags, a violation of federal law. (R237 (Notice of Failure to
27 Conduct Recall).) This is a serious issue, implicating safety concerns for customers, and liability
28 concerns for the customer, dealer, and GM. (RT Vol. 2, 361:12-362:10 (Deprez).)

1 **2. 2016 Year-End Results: Folsom Chevrolet Fails to Meet its Sales or**
2 **Customer Service Obligations**

3 109. Little changed in the dealership's performance across the full-year of 2016. Folsom
4 Chevrolet made 738 sales against an expectation of 1,324, a shortfall of 586 units. (R242E.002
5 (2016 Sales Performance Review).) The result was yet another "unsatisfactory" RSI of 55.74,
6 ranking it 113th of 128 Chevrolet dealers in California. (*Id.*) With respect to customer satisfaction,
7 the dealership's PDS scores declined yet again, and were well below the Zone, Region, and Division
8 averages. (R268.002.) Folsom Chevrolet's customer loyalty measures also continued to rate lower
9 than the District, Zone, Region, or National Averages. (R241E.001.)

10 110. Despite these struggles, the dealership had yet another extremely profitable year,
11 recording a profit of \$1,639,756 in 2016. (*See* R243E.001 (2014 Operating Report) at line 63.) It
12 continued to pay Mr. Crossan a \$288,000 salary, as well as \$1,144,500 in rent, and paid \$74,605 in
13 taxes for properties owned by Mr. Crossan. (R243E.002 at lines 8, 41, 45.) In addition to the above,
14 it also paid out a \$397,000 dividend, to cover Mr. Crossan's personal income taxes. (RT Vol. 8,
15 158:24-159:16 (M. Crossan).)

16 111. The dealership again earned a majority of its gross profits by selling to fleet
17 customers. Although the dealership finally sold more retail trucks (536) than fleet (471), it earned a
18 far higher gross profit per unit on the fleet sales (\$1,584 vs. \$846). (R243E.005 at lines 41, 43.)
19 However, the dealership also earned an additional \$543,927 in incentives from General Motors
20 under the SFE program in 2016, which is designed to reward retail sales that exceed a dealership's
21 previous efforts. (RT Vol. 1, 192:12-199:4; P185 (Stockton Report) at 80, App. p. 12.) Mr. Stockton,
22 Folsom Chevrolet's expert, determined that these SFE incentives nearly doubled the gross profit the
23 dealership earned on every retail unit in 2016. (P185 (Stockton Report) at 80, App. p. 12.)

24 112. All told, the dealership's fleet department earned \$784,774 in gross profits in 2016,
25 approximately 55% of its total. (*Id.*) If the SFE payments are considered, the fleet department earned
26 about 40% of the overall total. (*Id.*)

113. 2016 was the sixth consecutive year that Folsom Chevrolet failed to hit even 60 RSI—itself a failing grade. The following chart summarizes Folsom Chevrolet’s underperformance over that time frame:

Year	Actual Sales	Expected Sales	Missed Sales	RSI	Rank in State
2012	373	787	-414	47.40	123 of 135
2013	370	904	-534	40.93	129 of 133
2014	428	963	-535	44.44	124 of 128
2015	652	1,142	-490	57.09	115 of 131
2016	738	1,324	-586	55.74	113 of 128

(R242A-E (2012-2016 Sales Performance Review).)

G. November 2016: Termination

114. Based on the failure of Folsom Chevrolet to cure its material breaches of the Dealer Agreement, General Motors was left with little choice except to take the final, very rare step of terminating its Dealer Agreement with Folsom Chevrolet. The final decision to terminate was made by Mr. Ron Meier, Regional Director for Chevrolet’s Western Region. General Motors hand-delivered the Notice of Termination to Mr. Crossan at an in-person meeting on November 3, 2016. (See R238 (Nov. 3, 2016 Ltr. to M. Crossan) (“Notice of Termination”).)

115. The bases for termination described in the Notice of Termination were the dealership’s material breaches of its sales and customer satisfaction obligations under the Dealer Agreement, as shown by its RSI and CSI scores. (R238.001-3.) However, prior to making his decision, Mr. Meier consulted with numerous GM representatives, including Mr. Stinson (who also relayed information learned by Mr. Escalante), Mr. Giguere, Mr. Secrest, in-house counsel, and others. (RT Vol. 4, 18:24-21:3 (Meier).) He learned of the dealership’s operations from Mr. Stinson, including its over-emphasis on fleet sales, its failure to hold managers accountable, and Mr. Crossan’s failure to exercise personal services as required by the Dealer Agreement. (RT Vol. 4, 21:4-23:3 (Meier).) With Mr. Giguere, Mr. Meier reviewed the dealership’s substandard RSI over the course of years and confirmed the dealership’s AGSSA was properly configured. (RT Vol. 4, 23:11-25:7 (Meier).) Mr. Giguere further confirmed that using the Sacramento DMA as a benchmark, instead of California state average, made no material difference to Folsom Chevrolet’s

1 RSI. (RT Vol. 4, 24:14-20 (Meier).) Mr. Giguere's analyses are referenced in the Notice of
2 Termination. (R238.002; RT Vol. 4, 33:4-34:8 (Meier).)

3 116. Mr. Meier also reviewed numerous documents, including the quarterly contact letters,
4 correspondence between GM and the dealership, analyses of CSI deficiencies, and the overall RSI
5 trend, as shown in quarterly sales performance reviews. (RT Vol. 4, 25:8-27:13 (Meier).)

6 117. Based on this information, Mr. Meier and GM determined that Folsom Chevrolet had
7 materially breached the Dealer Agreement through its "profound and prolonged" deficiency in the
8 PDS and SSS metrics, as well as the dealership's "very, very deficient" RSI and continuous ranking
9 at the bottom of the state of California in sales performance. (RT Vol. 4, 27:14-29:1, 40:15-41:1
10 (Meier).) Mr. Meier described the ultimate decision to terminate as "agonizing." (RT Vol. 4, 15:20-
11 16:16 (Meier).) For both Mr. Meier, a 40-year veteran of GM, and Mr. Stinson, a 24-year veteran, it
12 was their first experience with a termination. (RT Vol. 1, 52:3-7, 206:15-18 (Stinson); Vol. 4, 7:1-3,
13 16:17-19.)

14 **H. 2017: The Dealership's Personnel Changes Demonstrate that Improvement is**
15 **Possible**

16 118. In May 2017, Larry Crossan retired from the dealership, and was replaced with a new
17 general manager, Mr. Brian Kaestner. (RT Vol. 9, 151:17-21 (D. Crossan).) Upon his arrival, Mr.
18 Kaestner implemented a number of changes. Most prominently, he altered the store's sales model,
19 eliminating the assistant sales manager position. (RT Vol. 9, 227:10-18 (Kaestner).) Mr. Kaestner
20 also "made some changes to designate certain personnel to monitor what we call leads that come
21 through the Internet department," due to issues with accountability for following up on those leads.
22 (*Id.*) He also changed the pay plans for dealership personnel, incentivizing them more on volume
23 and less on gross profits, as well as adding performance standards. (RT Vol. 8, 146:22-147:5
24 (Kaestner).) Following Mr. Kaestner's arrival and those changes, and without firing anybody, there
25 was "almost . . . a hundred percent turnover with the sales force." (RT Vol. 9, 243:9-25 (Kaestner).)

26 119. Mr. Kaestner made some less-controversial changes as well. He has implemented a
27 program called vAuto Conquest, which offers powerful tools to ensure consistent, competitive, and
28 age-sensitive pricing on the dealership's inventory. (RT Vol. 9, 230:17-233:5 (Kaestner).) This was

1 a tool that was always available to Folsom Chevrolet, but the dealership was unfamiliar with it. (RT
2 Vol. 9, 153:18-154:1 (D. Crossan).) Mr. Kaestner also introduced a new pricing promotion on
3 Silverados with the “AllStar” trim package, adding discounts to an existing Chevrolet promotion to
4 offer 25% off the price on those vehicles. (RT Vol. 9, 152:22-153:11 (D. Crossan).)

5 120. The result is that the dealership’s sales have risen since Mr. Kaestner’s arrival in May
6 2016. (R270.) Thanks to these changes, the dealership was able to sell more than 100 vehicles—105
7 and 107—in two months in 2017. (*Id.*) However, this did not result in the dealership becoming even
8 temporarily sales-effective, since its expected sales for 2017 were approximately 125 units per
9 month for 12 full months. (*Id.*)

10 121. In January 2018, just prior to and during the hearing, Folsom Chevrolet’s sales fell to
11 just 55 units against an objective of 100—”still far short.” (RT Vol. 4, 31:6-12 (Meier).) That
12 objective, which is not the same as RSI, takes into account the generally-lower industry sales in
13 January. (RT Vol. 4, 74:25-76:5 (Meier).) The Northern California zone as a whole, meanwhile,
14 finished “in the vicinity of 90 percent to objective, maybe a little bit higher than that.” (RT Vol. 4,
15 74:19-24 (Meier).)

16 **I. 2018: GM Commits to Installing a New Dealer in Folsom at the Existing Facility**
17 **if Termination is Permitted**

18 122. Testimony at the hearing established that if Folsom Chevrolet’s Dealer Agreement is
19 terminated, General Motors intends to establish a new dealer in Folsom. (RT Vol. 4, 43:7-9 (Meier);
20 RT Vol. 1, 204:13-21 (Stinson).) General Motors has the contractual right to lease the existing
21 Folsom Chevrolet property and facility until 2024, and so is highly likely to maintain the Chevrolet
22 brand at the current location. (*See* R253 (Prime Lease); RT Vol. 4, 166:20-169:11 (Gaspardo).) In
23 addition, General Motors would likely interview the existing employees and keep any that fit. (RT
24 Vol. 1, 204:25-205:8 (Stinson).) And while it would be inappropriate to offer the point to a dealer at
25 present, GM maintains a list of vetted, “ready now” candidates who would be willing and able to
26 operate from the current location and facility upon approval. (RT Vol. 4, 103:21-104:13 (Meier).)
27
28

1 123. GM therefore anticipates minimal disruption if termination is approved. (RT Vol. 4,
2 103:10-13 (Meier).) However, it does expect improved sales performance and customer satisfaction
3 on the retail side. (RT Vol. 4, 43:10-18 (Meier).) As Mr. Stinson explained, "it's amazing" how a
4 new dealer with a "new set of eyes," "new processes," "new people," and generally "new fresh
5 blood . . . can change the perspective of a store." (RT Vol. 1, 205:9-20 (Stinson).) This is likely to
6 bring greater employment and more tax revenue to the city. (RT Vol. 8, 32:19-33:10 (Gagliardi).)

7 **III.POTENTIAL CAUSES OF FOLSOM CHEVROLET'S POOR SALES**

8 124. As described above, General Motors found a material breach of the Dealer
9 Agreement due to Folsom Chevrolet's consistently poor sales, as measured by RSI, and continuous
10 ranking at the bottom of the state of California in sales performance. (RT Vol. 4, 27:14-29:1, 40:15-
11 41:1 (Meier).) The record reflects causes of Folsom Chevrolet's poor sales are due to its own
12 operational decisions.

13 **A. Folsom Chevrolet Repeatedly Robbed its Inventory for Fleet Customers**

14 125. Chief among Folsom Chevrolet's issues was its consistent—and ongoing—practice of
15 selling or trading its inventory to satisfy fleet customers. This practice runs contrary to GM's
16 suggested practices and harms the dealership's stock of new vehicles. As a result, the dealership's
17 ability to make retail sales was greatly diminished.

18 **1. Inventory is Critical for Retail Sales**

19 126. Every witness who testified on the topic at the hearing agreed that having inventory
20 on the ground is a critical aspect of making retail sales. Mr. Muiter noted that 96.5% of all General
21 Motors retail sales are made from dealership stock. (RT Vol. 3, 67:25-68:12 (Muitter).) He therefore
22 testified that retail availability is critical, "so that they can see the product, demonstrate the product,
23 et cetera, and have a reasonable selection of the product." (RT Vol. 3, 73:10-18 (Muitter).)

24 127. Mr. Stinson agreed that "you need vehicles" and "the product mix" because
25 "customers want to see several various packages within models, they want to see colors, different
26 price points. . . . [I]f you don't have those, then the customer will find a dealer who does." (RT Vol.
27 1, 145:11-20 (Stinson).) The Internet has increased that importance even further, because customers
28 are on the Internet "shopping while you're not there . . . at night, and, you know, all hours of the

1 day” and “if you don’t have the right model mix, and the right prices, then they’re not even going to
2 consider you.” (RT Vol. 1, 145:21-146:4 (Stinson).)

3 128. Mr. Meier echoed the importance of inventory availability in getting customers to the
4 store:

5 [Y]ou need to have an adequate variety and number of retail units in
6 stock, particularly now that so much of the shopping experience is
7 done prior to a customer ever coming to the store through every dealer
8 has a website, can shop inventory, and if you see that a particular
9 dealer that you might be interested in shopping doesn’t have either the
appropriate mix of inventory or quantity of inventory, you may get
dismissed right out of hand before they even come to the store.

10 (RT Vol. 4, 35:15-36:11 (Meier).)

11 129. Mr. Stinson was also asked what “common set of dealer behaviors” he has observed
12 in the bottom 15 percent of dealers, and answered that “a lot of what I see is those dealers elect not
13 to order enough grounded stock.” (RT Vol. 1, 225:18-226:20 (Stinson).) He continued: “They
14 don’t—they’re not aggressive enough to order enough cars, order enough trucks. Like I said before
15 is, you know, it’s important that a dealer orders many models, and many combinations of colors and
16 packages.” (*Id.*)

17 130. Folsom Chevrolet’s witnesses repeatedly spoke to the importance of inventory as
18 well. Larry Crossan testified: “I think most customers appreciate the availability of being able to go
19 in and having a multitude of cars or trucks to pick from. They like to touch it and feel it and smell
20 it.” (RT Vol. 8, 81:4-9 (L. Crossan).) He also testified that, because of the Internet, two of the most
21 important factors for a dealership are product pricing and product availability. (RT Vol. 8, 90:13-16
22 (L. Crossan).) Larry Crossan cited inventory as a cause of the dealership’s inability to hit its sales
23 objectives, and argued that the dealership was able to perform better during the mid-2000s because it
24 carried more inventory of the time. (RT Vol. 8, 49:3-6, 89:12-18 (L. Crossan).)

25 131. Drew Crossan described how much more effective the dealership became as it
26 increased its inventory of vehicles: “what we found is as your inventory grows -- I mean it makes
27 sense, if you have the product, the customers will come. So as our inventory has grown, more people
28 see it and more people come to it.” (RT Vol. 9, 136:5-18 (D. Crossan).) He therefore agreed that

1 inventory availability is “key.” (RT Vol. 9, 146:21-148:5 (D. Crossan).) Drew Crossan also testified
2 that the “big reason” the Ford dealer in the Folsom Auto Mall was outselling Folsom Chevrolet was
3 that they had more inventory availability. (RT Vol. 9, 146:15-24 (D. Crossan).)

4 132. Marshal Crossan agreed that customers today “expect the dealership to have a good
5 availability of product” that is “properly presented and also priced on the Internet.” (RT Vol. 8,
6 206:8-15 (M. Crossan).) He further testified that customers are willing to look at six to eight
7 dealerships to find a vehicle. (RT Vol. 8, 206:16-18 (M. Crossan).) Mr. Kaestner concurred that
8 “95% of all shoppers are online before they go into any place to purchase.” (RT Vol. 9, 251:14-17
9 (Kaestner).) Thus, a “major factor” as to why a retail customer makes a purchase at a particular
10 dealership is inventory availability. (RT Vol. 10, 11:10-21 (Kaestner).)

11 2. There is a Difference Between Retail and Fleet-Type Vehicles

12 133. Testimony at the hearing established that retail and fleet customers tend to prefer
13 different types of vehicles. This is typically seen in the trim packages applied to the vehicle, as fleet
14 units are “more likely to be white” and “stripped down”—lacking some of the features typically
15 sought by retail customers. (RT Vol. 2, 394:14-395:19 (Escalante).)

16 134. Mr. Meier testified that “a retail customer typically would not want a white regular
17 cab Silverado, for example. That would be typically a work truck or a fleet truck. Typically a retail
18 customer would want an LT moderately equipped vehicle.” (RT Vol. 4, 36:12-25 (Meier).) He
19 continued: “LT is the heart of the market where we do most of our volume that would have more
20 chrome, more trim, crew cab, not regular cab, and more options and more options associated with
21 the truck, more functionality, more suitability for a retail customer.” (RT Vol. 4, 39:9-17 (Meier).)

22 135. This understanding is shared by dealership personnel. Drew Crossan described fleet
23 units as “pretty basic vehicles”—“usually not big red Silverados.” (RT Vol. 9, 147:21-148:7 (D.
24 Crossan).) He also described trucks with “a contractor body”—“the big trucks with the boxes on the
25 back”—and noted that the dealership prefers someone from the fleet department to show those to
26 customers, as they are more familiar with the vehicles. (RT Vol. 9, 169:16-170:4 (D. Crossan).)
27 Similarly, Mr. Schoonbrood defined a “work truck” as “basically a regular cab vehicle or a double
28 cab vehicle, lightly equipped.” (RT Vol. 9, 210:11-21 (Schoonbrood).)

1 **3. General Motors' Suggested Practices for Fleet Sales**

2 a. Types of Fleet Sales

3 136. A fleet sale is a vehicle delivery reported to GM using the fleet delivery code. (RT
4 Vol. 2, 328:4-10 (Ryan).) To qualify as a fleet, a company has to have a Fleet Account Name
5 ("FAN"), which they can obtain by either: (1) having 15 or more registrations in the company name,
6 or (2) purchasing five vehicles or more in the last year. (*Id.*) Ordering using a fleet account number
7 offers several benefits, including special pricing and incentive packages and extended warranties.
8 (RT Vol. 2, 328:15-21 (Ryan).)

9 137. There are several sub-types of fleet sales within the broader category. Relevant to this
10 proceeding, GM makes a distinction between "dealer fleet," "CAP fleet," and government fleet
11 sales. (RT Vol. 2, 328:22-329:16 (Ryan).) Dealer fleet refers to smaller fleets, like a local
12 construction company, while a CAP fleet would be a much larger entity, like Pfizer or AT&T. (RT
13 Vol. 2, 329:17-330:2 (Ryan).)

14 138. These fleet sales are separate from a type of sale that was referred to at various times
15 during the hearing as "small business," "commercial," "Business Elite," or "fleetail." These all refer
16 to sales that are made to a business which does not qualify for a FAN, such as a sole proprietor
17 contractor. (RT Vol. 2, 330:3-15 (Ryan).) Mr. Ryan referred to this type of sale, made with delivery
18 type 018, as "retail small business," because it counts as a retail sale for purposes of RSI. (RT Vol. 2,
19 330:3-21 (Ryan).) This brief will refer to these sales as "small business."

20 b. General Motors Prohibits Fleet Inventories

21 139. When a fleet sale is made, it is entered into GM's system as a "sold order." (RT Vol.
22 2, 245:22-246:13 (Stinson).) That means that GM takes the sale and builds it in a factory as ordered,
23 at high manufacturing priority, before shipping it to the requested address. (RT Vol. 1, 147:15-
24 148:25 (Stinson).) The process takes approximately 6 to 8 weeks to complete. (*Id.*) This is typically
25 not an issue, because fleet customers are planning ahead: "They're not impulse buyers. . . . a
26 significant percentage of our fleet business are vehicles that are ordered. That's why we have the
27 process. It's a planned event based on their own budgets. They budget." (RT Vol. 3, 115:17-116:11
28 (Muiters).)

1 140. A fleet sale must be tied to a Fleet Account Number, which means it is tied to a
2 specific customer. (RT Vol. 2, 285:11-286:22 (Stinson).) For that reason, “[a] fleet unit cannot just
3 be ordered as inventory. It is a sold order only.” (RT Vol. 2, 245:22-246:13 (Stinson); see also RT
4 Vol. 9, 204:17-205:4 (Schoonbrood) (agreeing that GM does not permit dealers to create a fleet
5 inventory).) GM takes this obligation seriously—if the ordered vehicle is not delivered to the
6 customer as expected, GM may audit the sale and potentially recoup any special incentives or
7 pricing that fleet vehicle received. (RT Vol. 2, 285:11-287:8 (Stinson).)

8 c. General Motors Highly Discourages the Sale of Retail Vehicles to
9 Fleet Purchasers

10 141. In contrast to a fleet order submitted to be built by GM, it is permissible for
11 dealerships to sell retail units already in their inventory to a fleet customer. However, this practice is
12 “highly not recommended.” (RT Vol. 2, 287:9-11 (Stinson).) Primarily, this is because it depletes the
13 existing inventory, with the result that “instead of the fleet customer waiting 6 to 8 weeks for that
14 unit . . . the [retail] customer then wait[s] 6 to 8 weeks for those vehicles to be in the retail
15 inventory.” (RT Vol. 1, 149:1-151:1 (Stinson).) Thus, when asked whether “most dealers on fleet
16 order the fleet and wait for it to come, rather than taking from their retail inventory,” Drew Crossan
17 replied: “I think that that’s the conception, that’s the goal.” (RT Vol. 9, 167:12-19 (D. Crossan).)

18 142. The practice can be harmful in other ways too. For example, this practice can affect a
19 dealer’s allocation in the future, as a retail vehicle sold to a fleet customer does not increment the
20 dealer’s sales rate for that vehicle. (RT Vol. 2, 287:15-20 (Stinson).) The dealer’s available days’
21 supply will still reflect the loss, but the dealer misses out on the opportunity to improve their turn
22 rate. (RT Vol. 2, 287:15-289:2 (Stinson).) This can be significant, because the allocation process is
23 inherently competitive: “it’s turn and earn relative to how everything else”—and everyone else—is
24 selling.” (RT Vol. 9, 105:23-106:25 (D. Crossan).)

25 4. **Folsom Chevrolet Chose not to Follow GM’s Suggested Practices**

26 143. The evidence at the hearing established that Folsom Chevrolet does not follow the
27 suggested practices outlined above. Instead, the dealership engages in a range of legal-but-
28 discouraged practices which have resulted in severe inventory deficiencies.

1 a. Folsom Chevrolet Routinely Sells Inventory to Fleet Customers

2 144. Upon placing Folsom Chevrolet in the performance improvement program, General
3 Motors soon discovered that the dealership was selling its retail units to fleet customers. (RT Vol. 1,
4 146:13-147:4 (Stinson).) According to Mr. Escalante, Mr. Schoonbrood told him that “part of the
5 successful fleet operation that Folsom has is that fleets will pay a premium to have the unit readily
6 available as opposed to just waiting for the fleet unit to be ordered.” (RT Vol. 2, 396:20-397:10
7 (Escalante).) As a result, the dealership decided “to utilize retail inventory for selling a fleet
8 customer.” (RT Vol. 2, 396:20-397:10 (Escalante).)

9 145. The dealership has admitted to this practice. Larry Crossan testified that if a fleet
10 customer wants a vehicle right away, “we’d have to see what we had in inventory that would work
11 for ‘em.” (RT Vol. 8, 69:16-23 (L. Crossan).) Mr. Schoonbrood testified that the first thing he does
12 if a customer needs a vehicle right away is “look to see if I have that in stock.” (RT Vol. 9, 206:4-21
13 (Schoonbrood).)

14 146. Folsom Chevrolet argued at the hearing that this is only permitted under certain
15 circumstances, but the scale of these transactions belies that claim. Mr. Schoonbrood testified that 90
16 percent of his sales, and the majority of Folsom Chevrolet’s fleet business, are fulfilled from
17 inventory. (RT Vol. 9, 207:8-208:6 (Schoonbrood).) He personally sells 300 to 400 units per year,
18 meaning 270 to 360 vehicles are sold this way each year. (RT Vol. 9, 208:15-209:3 (Schoonbrood).)

19 147. Mr. Schoonbrood also testified that there have been multiple times when he has sold
20 large amounts of dealership inventory in a single sale: “I think I’ve done a few, 10, 15 or 20, at one
21 time that these clients needed them right away, either as replacements or I’m not sure why, that they
22 asked for them out of stock because they needed them.” (RT Vol. 9, 189:17-25 (Schoonbrood).)
23 Larry Crossan agreed that Mr. Schoonbrood “would do, you know, three, four, five and then
24 sometimes he’d do 15 or 20.” (RT Vol. 8, 69:24-70:6 (L. Crossan).) In fact, Mr. Schoonbrood sold
25 seven vehicles out of inventory in a single transaction just the week before he testified. (RT Vol. 9,
26 189:4-16 (Schoonbrood).)

27 148. The result is that a very high proportion of Folsom Chevrolet’s inventory is sold to
28 fleet customers. Mr. Muiter analyzed several years of data, and found that in 2017, 31.5% of the

1 vehicles delivered to the dealership as retail were in fact sold to fleet buyers. (R279.001.) By
2 comparison, only 3.52% of Chevrolet sales are made that way overall, including 7.25% of sales by
3 the average dealership *in the Business Elite program*. (*Id.*) The numbers for 2016 are similar, with
4 28.4% of Folsom Chevrolet's retail units being delivered fleet, compared to 3.07% of Chevy dealers
5 nationwide and 6.43% of Business Elite dealers specifically. (R279.002.) 2015 is similar as well,
6 albeit in a smaller sample size. (R279.003.) In fact, the trend from 2015 to 2017 shows an overall
7 increase, meaning the dealership is actually moving towards an even greater percentage of inventory
8 being utilized for fleet sales each year. (RT Vol. 3, 74:11-21 (Muiters).)

9 b. Folsom Chevrolet Routinely Trades Inventory to Satisfy Fleet
10 Customers

11 149. In addition to selling vehicles directly from inventory, Folsom Chevrolet will trade
12 retail units for vehicles needed by its fleet customers. (RT Vol. 1, 149:1-151:1 (Stinson).) While the
13 terms of any trade are of course a negotiation, Mr. Stinson testified that he saw "a trend of giving up
14 good product or even, in some cases, the newest hot product to get some just base units back to
15 satisfy that fleet customer." (*Id.*)

16 150. The dealership admitted that Mr. Schoonbrood is permitted to trade units to make
17 fleet sales, but insists it is tightly controlled: "if I had a lot of inventory in that particular model and
18 it wasn't a real super hot vehicle, then yeah, we would go ahead and let him trade it; otherwise, he
19 did not get to trade it." (RT Vol. 8, 60:13-19 (L. Crossan).) However, Mr. Schoonbrood testified that
20 the majority of his trades have been permitted by the dealership. (RT Vol. 9, 209:6-15
21 (Schoonbrood).)

22 151. Furthermore, Mr. Schoonbrood appears to have the ability to trade any fleet-type unit
23 already in stock, testifying that if he's trying to get "a work truck . . . and the dealer that we're
24 asking for has that and he wants another work truck back, don't need to really go to Drew or BK for
25 permission on that." (RT Vol. 9, 210:11-211:7 (Schoonbrood).) As Drew Crossan explained,
26 however, "just because it has a contractor body . . . doesn't prevent them from being" sold. (RT Vol.
27 9, 168:8-169:25 (D. Crossan).) In fact, he had just sold three "work truck Colorados" the week prior
28 to testifying. (*Id.*) And Larry Crossan asserted that the Business Elite allocation "actually helped to

1 make our truck inventory a lot better,” because they were able to obtain “trucks that we couldn’t get
2 retail” through the normal allocation process. (RT Vol. 8, 58:21-59:12 (L. Crossan).)

3 152. Given this conflicting testimony, it is somewhat difficult to get a handle on the scale
4 of Folsom Chevrolet’s dealer trades. However, Mr. Muiter was able to analyze the results of the
5 dealership’s trades in 2017. (R279.004.) He determined that the dealership traded out 263 vehicles in
6 2017, 99% of which—261—were originally ordered through retail allocation. (RT Vol. 3, 78:14-25
7 (Muter).) However, of the units the dealership received back, only 57% were ultimately reported
8 sold to a retail customer, while 43% were reported sold to a fleet customer. (RT Vol. 3, 77:14-
9 78:13.) Thus, although it appears the dealership was able to obtain some extra units overall (possibly
10 through outright purchases), it suffered a net loss of 90 units to its retail inventory due to trading
11 activity. (R279.004.)

12 c. Folsom Chevrolet Routinely Orders Vehicles Through Retail
13 Allocation then Earmarks them for Fleet Department Use

14 153. In addition to the above issues, another potential factor affecting the dealership’s
15 inventory is a skew in the ordering process itself. Throughout 2014 and 2015, primary responsibility
16 for ordering the dealership’s retail vehicles was entrusted to Mr. Schoonbrood, meaning he chose the
17 mix of models and trim packages the dealership purchased. (RT Vol. 2, 397:11-20 (Escalante).) Mr.
18 Escalante testified that he knows this because Mr. Schoonbrood “told me that’s what his job was.”
19 (RT Vol. 2, 447:15-20 (Escalante).) In addition, he testified that Mr. Schoonbrood “would ask me
20 for suggestions on what was the greatest units or the newest units coming out.” (*Id.*)

21 154. Folsom Chevrolet has disputed this, but Drew Crossan admitted that David Shirley
22 “had been working with Rene to order the inventory” prior to Mr. Shirley’s departure. (RT Vol. 9,
23 103:7-18 (D. Crossan).) Furthermore, although the dealership’s ordering is currently done by Drew
24 Crossan, he still gives “occasional deference to Rene, because Rene has a lot of experience.” (RT
25 Vol. 2, 449:4-15 (Escalante).) Mr. Escalante testified that he knows this “[b]ecause Drew told me so
26 . . . about four or five months go.” (*Id.*) Drew Crossan acknowledged this fact, testifying that he
27 “work[s] with Mr. Schoonbrood” for ordering and that “Rene and I like to discuss different trim
28 levels and models and kind of build out the game plan.” (RT Vol. 9, 119:13-120:25 (D. Crossan).)

1 He also noted that Mr. Schoonbrood's input is not "limited to just fleet issues." (RT Vol. 9, 121:1-7
2 (D. Crossan).)

3 155. It is not entirely clear when Drew Crossan took over the ordering process. He asserted
4 during the hearing that it was "probably six months" prior to David Shirley leaving, which is itself
5 an ambiguous date. (RT Vol. 9, 103:19-24 (D. Crossan).) However, Drew Crossan testified that he
6 inadvertently turned down some allocated trucks due to being "new to the system," an event which
7 occurred in August 2015. (RT Vol. 9, 128:25-129:9, 149:2-8 (D. Crossan).) Thus, it appears Mr.
8 Schoonbrood had ordering duties throughout 2014 and much of 2015.

9 156. In any event, regardless of who does the ordering, it is clear that the dealership sets
10 aside much of its inventory as "fleet-type" units—vehicles preferable to fleet customers due to their
11 trim level. Drew Crossan described this as "earmark[ing] for fleet," and he differentiated it from
12 vehicles which absolutely cannot be sold retail (such as police cars). (RT Vol. 9, 168:17-179:7 (D.
13 Crossan).) Vehicles in this category include, at a minimum, "that stimulus that comes from Paul
14 Ryan." (*Id.*) Drew Crossan did not explain further, but given the numbers, it seems likely that such
15 earmarks include any vehicle ordered with a trim package "more likely to appeal to a fleet
16 customer," as described in detail above. (RT Vol. 2, 395:15-19 (Escalante).)

17 157. The "Retail vs. Fleet" chart produced by Folsom Chevrolet makes clear that this is a
18 sizeable portion of its inventory. (*See* R264.) The percentage set aside for fleet ranges from a low of
19 24% to a high of 76% across 2014-2016, and typically includes triple-digit numbers of fleet units.
20 (*Id.*) In June 2015, the dealership had just 96 units in stock earmarked for "retail," against 297 units
21 earmarked as "fleet." (*Id.*)

22 **5. Folsom Chevrolet's Fleet Practices Caused its Inventory to Become**
23 **Imbalanced and Inadequate**

24 158. Folsom Chevrolet's practices of selling retail units to fleet customers, trading retail
25 units to satisfy fleet customers, and ordering and earmarking disproportionate numbers of "fleet-
26 type" vehicles resulted in serious inventory imbalances. As Mr. Muiter put it, "a high percentage of
27 [Folsom Chevrolet's] vehicles are sold to the retail customer out of stock. . . . [T]he retail stock is
28 being depleted in order to satisfy fleet customers." (RT Vol. 3, 79:1-17 (Muitter).)

1 159. Mr. Stinson's investigations in 2014 had found the same thing, revealing that Folsom
2 Chevrolet's overall inventory numbers were hiding "pockets of deficiency" in key vehicle lines like
3 Silverado. (RT Vol. 1, 146:5-12 (Stinson).) This was due to the "big trend" of selling inventory to
4 fleet customers, which results in a "constant imbalance of your retail stock." (RT Vol. 1, 149:1-
5 151:15 (Stinson).) In fact, Mr. Stinson called the minute number of Silverados at this time a
6 "glaring" problem for the dealership. (RT Vol. 2, 295:16-24 (Stinson).)

7 160. Mr. Stinson also described the difficulty the dealership's sales staff faced as a result
8 of Folsom Chevrolet's fleet practices: "every dealer needs to put the research in to make sure they're
9 ordering the right model mix of what sells in the marketplace," but if "all of a sudden my team is
10 dealer trading those vehicles to other stores, then all of my research just went to the wayside,
11 because now I end up with vehicles that are imbalanced." (RT Vol. 1, 200:11-201:16 (Stinson).)

12 161. The "Retail vs. Fleet" chart produced by Folsom Chevrolet also reflects that its
13 inventory is "unusually highly skewed towards fleet units." (RT Vol. 2, 392:18-24 (Escalante);
14 R264.) Other Business Elite dealers more typically carry around 7-9% fleet-type units, but Folsom
15 Chevrolet maintains roughly 40% of its inventory earmarked for fleet. (RT Vol. 2, 394:5-13
16 (Escalante); R264.)

17 162. The result of the inventory imbalance is that the dealership becomes significantly less
18 attractive to retail customers—who, as detailed *supra*, look at dealerships' inventories before they
19 decide to visit in person. Mr. Stinson testified that Folsom Chevrolet's practices therefore
20 "[a]bsolutely" have "a potential negative and harmful impact on the sales rate of the dealership."
21 (RT Vol. 1, 153:8-16 (Stinson).) He also noted how difficult these practices made it for him and Mr.
22 Escalante to assist Folsom Chevrolet improve:

23 Q Do you believe that these issues that you saw in the retail
24 department contributed to their poor retail sales performance?

* * *

25 THE WITNESS: So, yes, the -- I mean, the -- the retail inventory, I
26 mean, it was -- it was really frustrating for me, because I obviously
27 saw the RSI and I'm there with Saul to improve the process. And I feel
28 that every time we're building up the inventory, I never know every
time I would leave a meeting where that inventory would go. So it was

1 a constant imbalance of, hey, do you really have enough product to
2 sell?

3 (RT Vol. 1, 202:8-21 (Stinson).)

4 163. Mr. Meier concurred that the imbalance hurt Folsom Chevrolet's sales: "certainly,
5 when you have a situation where you routinely either trade away your, you know, hot retail units to
6 satisfy an immediate fleet need, not to mention, you know, specing and ordering vehicles that aren't
7 necessarily appropriate for the retail market, that can have a major impact on a dealership's RSI."

8 (RT Vol. 4, 35:15-36:11 (Meier).)

9 **6. Folsom Chevrolet Knew it was Operating Outside of GM's Suggested**
10 **Practices, but Continued Anyway**

11 164. The evidence at the hearing established that Folsom Chevrolet was aware that it was
12 operating against GM guidelines and harming its retail sales. Mr. Escalante testified that he
13 specifically recommended that Folsom Chevrolet utilize the "traditional method to them of ordering
14 fleet . . . and not use the retail inventory so heavily, because they, in my opinion, needed the
15 inventory." (RT Vol. 2, 397:21-398:9 (Escalante).) Mr. Escalante began protesting the dealership's
16 fleet practice around 2014, discussing the issue with Marshal Crossan, Larry Crossan, and David
17 Shirley. (RT Vol. 2, 443:3-15 (Escalante).) He told them, "perhaps we should consider some of these
18 retail units for selling to retail customers." (*Id.*)

19 165. Mr. Stinson testified that he also discussed the issue with Mr. Crossan during the
20 quarterly contact process, stressing that "discipline needs to be instituted" and "you need to get your
21 fleet managers to order the vehicles and wait the 6 to 8 weeks." (RT Vol. 1, 200:11-201:16
22 (Stinson).) Mr. Crossan's response was relatively passive, simply stating he would speak with Mr.
23 Schoonbrood and "see what I can do." (RT Vol. 1, 201:17-24 (M. Crossan).)

24 166. When Drew Crossan was asked whether "most dealers on fleet order the fleet and
25 wait for it to come, rather than taking from their retail inventory," he replied: "I think that that's the
26 conception, that's the goal." (RT Vol. 9, 167:12-19 (D. Crossan).) He also described hearing "desk
27 people and David Shirley and Rene all kind of arguing over dealer trades" for vehicles to satisfy
28 fleet customers when he joined the dealership. (RT Vol. 9, 141:15-22 (D. Crossan).)

1 167. At Mr. Kaestner's deposition—which was shortly after he was hired—he expressed
2 surprise at the idea that Folsom Chevrolet's inventory was being traded for fleet units. (*Id.*) Mr.
3 Kaestner testified that his surprise was because "all the inventory on the ground is for retail
4 customers, in my opinion." (*Id.*)

5 168. The most damning evidence came from Mr. Crossan. Specifically, Mr. Crossan stated
6 in a July 2015 letter to GM that "our large number of fleet sales diminishes our inventory levels and
7 adversely impacts our ability to make additional retail sales." (R226.002.) He also described Folsom
8 Chevrolet as "a victim of its own success as an elite GM fleet sales dealership," because "we
9 consistently struggle to maintain the inventory necessary to achieve our *retail* sales goals." (*Id.*) He
10 described the issue during the hearing as: "some of what would be considered a custom fleet . . . had
11 been impacting our total sales." (RT Vol. 8, 192:18-193:4 (M. Crossan).)

12 169. Around the time he wrote his July 2015 letter, Mr. Crossan also spoke with Ed Peper,
13 head of Chevrolet's fleet division, in an effort to obtain additional inventory to fuel his fleet sales.
14 (RT Vol. 9, 58:4-59:15 (M. Crossan).) Mr. Crossan stated that Mr. Peper "openly said that at this
15 point, there would be no way that we could get a separate allocation type of an opportunity for
16 inventory." (*Id.*)

17 170. Yet Mr. Crossan's takeaway from the meeting was *not* that he needed to reconsider
18 his fleet practices. Instead, it was that Folsom Chevrolet would not necessarily lose inventory forever
19 if it sold to a fleet customer, because a lower Available Days' Supply earns more units. (*Id.*; RT Vol.
20 9, 61:2-15, 70:10-24 (M. Crossan).) At the time—approximately Summer 2015—Mr. Crossan had
21 never "had the total understanding of what would potentially happen with that vehicle on a retail
22 inventory," even though the dealership had been engaging in the practice for years. (RT Vol. 9,
23 70:10-71:3 (M. Crossan).)

24 171. Mr. Crossan and Folsom Chevrolet thus never made a serious effort to curtail their
25 fleet sales, even during the cure period. Mr. Schoonbrood testified that neither Marshal nor Larry
26 Crossan have asked him to change the fleet department's operations within the last five years, nor
27 has Mr. Kaestner. (RT Vol. 9, 209:16-210:5 (Schoonbrood).)

28 **7. Folsom Chevrolet is Highly Compensated for its Fleet Activities**

1 172. One possible reason Folsom Chevrolet ignored the detrimental effect of its fleet
2 practices for so long is that the department is exceptionally profitable. The dealership's depletion of
3 its inventory generates outsized returns; Mr. Escalante testified that Mr. Schoonbrood informed him
4 "that part of the successful fleet operation that Folsom has is that fleets will pay a premium to have
5 the unit readily available as opposed to just waiting for the fleet unit to be ordered." (RT Vol. 2,
6 396:24-397:10 (Escalante).)

7 173. As a result, Folsom Chevrolet's fleet gross profits often exceed its retail sales, both
8 per unit and as a whole, which is "uncommon." (RT Vol. 7, 117:9-118:10, 119:12-19 (Stockton).)
9 Similarly, it often sold more fleet units than retail units overall, another "uncommon" event. (*Id.*) A
10 chart created by Mr. Stockton shows Folsom Chevrolet earned approximately \$3.6 million in gross
11 profits from fleet sales in 2012 to 2016—more than it made by selling retail vehicles. (P185 at 80,
12 App. p. 12.)

13 174. This is important because the pay plans at Folsom Chevrolet are aligned to support
14 the seeking of gross profit specifically. Fleet salesmen, including Mr. Schoonbrood, are primarily
15 compensated on commission, earning 30 percent² of the gross profit from the vehicles they sell—
16 even higher than that earned by retail salesmen. (RT Vol. 9, 78:13-79:4 (M. Crossan).) The general
17 manager, Larry Crossan, was also compensated by "a percentage of the gross" on the front end,
18 including fleet sales. (RT Vol. 8, 40:4-10, 87:10-17 (L. Crossan).) And Marshal Crossan, who of
19 course ultimately receives all dealership profits, noted that fleet sales from inventory have a real
20 "opportunity for profitability," and the department as a whole "certainly has an impact on what the
21 bottom line profit is to the dealership." (RT Vol. 9, 56:10-22 (M. Crossan).)

22 175. Thus, even though it was incumbent upon Folsom Chevrolet to impose discipline on
23 its fleet department, it appears the fleet sales it made from inventory were so lucrative it looked the
24 other way. As Mr. Stinson put it, "I really feel that the fleet department was making so much money
25 at the time on a per new unit vehicle basis, that the money coming in was too good to pass up." (RT
26

27 ² That number was changed to 20 percent as of January 1, 2018, to comply with a change in
28 California law. (RT Vol. 9, 78:22-79:20 (M. Crossan).)

1 Vol. 1, 200:11-201:16 (Stinson).) Indeed, Folsom Chevrolet's own expert opined that it is "acutely
2 aware of its commercial sales activity and what it generates for the dealership." (RT Vol. 7, 115:18-
3 21 (Stockton).) For this reason, Mr. Stinson testified that he "felt that the fleet manager had the most
4 control of the dealership." (RT Vol. 1, 201:17-24 (Stinson).)

5 **B. Folsom Chevrolet's Sales Staff "Held Out for Gross"**

6 **1. Testimony and Data Indicate the Dealership Held Out for Gross Profit**

7 176. In addition to its profit-seeking in fleet sales, evidence at the hearing demonstrated
8 that Folsom Chevrolet sales staff often "held out for gross." The phrase refers to "holding a
9 minimum . . . price point that a dealer would not want to drop below," *i.e.*, having an amount of
10 gross profit on each sale below which it would not drop. (RT Vol. 2, 403:18-404:6 (Escalante).) Mr.
11 Escalante testified that he personally observed that Folsom Chevrolet appeared to be holding out for
12 gross during his weekly visits from 2014 to 2016. (RT Vol. 2, 404:7-9 (Escalante).)

13 177. The dealership has generally disputed that it held out for gross profits. However,
14 Drew Crossan conceded that when it comes to making a "skinny deal, or a loser deal, in order to
15 move that new car . . . there's limitations to how much you are willing to do." (RT Vol. 9, 97:25-
16 98:15 (D. Crossan).) For example, for any discount "over a couple hundred dollars, we ask that they
17 get . . . myself or the GM involved." (*Id.*)

18 178. Furthermore, data adduced at the hearing supports Mr. Escalante's observations. The
19 POP analysis conducted in 2014 showed that Folsom Chevrolet earned significantly more gross
20 profit per new retail vehicle than the composite groups. (R263.038; RT Vol. 1, 129:22-130:25
21 (Stinson).) For example, in April 2014, Folsom Chevrolet was earning \$422 more per unit than other
22 dealerships in the Sacramento DMA. (RT Vol. 1, 133:3-7 (Stinson).) The gross profit was
23 particularly high on new trucks, the area where Folsom Chevrolet experiences the greatest shortfall.
24 (R263.039; RT Vol. 1, 132:6-132:15 (Stinson).) And even when excluding fleet units, Folsom
25 Chevrolet earned thousands more in variable gross profit per new unit than the composites.
26 (R263.079; RT Vol. 1, 134:4-15 (Stinson).)

27 179. Mr. Farhat also analyzed Folsom Chevrolet's gross profits, and found similar results.
28 In 2013, for example, Folsom Chevrolet earned \$1,640 in gross profit per retail vehicle, while the

1 average California Chevrolet dealership earned just \$797—less than half. (R244.080 (Farhat
2 Report).) The dealership remained above 180% of the composite through 2014 and 2015. (*Id.*) Even
3 in 2016, when the dealership's more aggressive pricing came into play, it still earned approximately
4 135% more than other California Chevrolet dealers in gross profits. (*Id.*) Furthermore, the
5 dealership's used vehicles were also priced quite highly, meaning the dealership was not making up
6 the difference by giving up profits on its trade-ins. (*Id.*; (RT Vol. 5, 123:2-125:12, 182:23-183:9
7 (Farhat).)

8 2. Pricing and Pay Plans are Dealership Operational Choices

9 180. The gross profit earned on each sale, as well as pricing in general, are operational
10 choices within the control of the dealership. (RT Vol. 1, 135:21-24 (Stinson).) Folsom Chevrolet's
11 expert, Mr. Stockton, agreed, opining that "pay plans" and "level of aggressiveness in terms of
12 pricing" are some of the inputs a dealership has into its business. (RT Vol. 7, 143:16-144:1
13 (Stockton).) These inputs then produce outputs in the form of higher or lower sales. (RT Vol. 7,
14 147:24-148:3 (Stockton).) Thus, dealerships that wish to sell more vehicles can adjust their business
15 model to make less money on each sale, but more sales overall, and earn back the money on the
16 "back end" (service, parts, finance):

17 A lot of dealerships advertise extremely low front end prices, and the
18 idea is that they will have big inventories. They'll advertise very low
19 sales prices, and then when the customers come in, they will try to
20 make their money in other products, like finance and insurance
products, or possibly making money off of the trade-ins.

21 So one volume method that is . . . certainly not uncommon, is to have a
22 really big regional presence, a dealership that's really visible, that has
a lot of traffic, to advertise extremely low prices, and then to make
money on what I say is the back end.

23 (RT Vol. 7, 148:13-149:7 (Stockton).) In addition, Mr. Stockton testified that dealerships that wish
24 to sell more vehicles need to make sure their pay plans reflect that fact:

25 [I]f you want your dealership really to push sales volume, and you
26 don't want to let customers walk away, then your salespeople are
27 working really hard to make sales, but they're not making as much
28 gross profit on each sale.

1 So you have to adapt your pay plan to incentivize them to be willing to
2 sell cars with customers who are only willing to pay the bottom -- the
3 bottom price. . . . [I]f you look at a lot of the very big dealers, that's
4 how they do business.

(RT Vol. 7, 145:11-146:1 (Stockton).)

5 3. Dealership Practices Incentivized Seeking Higher Gross Profits

6 181. Folsom Chevrolet could have chosen "inputs" that lead to high volume sales, like
7 those chosen by John L. Sullivan, a local dealership that carries a large inventory and advertises low
8 prices, and—not coincidentally—meets RSI. (RT Vol. 7, 150:5-11 (Stockton).) However, Folsom
9 Chevrolet chose a different approach. This can be seen in its pay plans, which incentivize its sales
10 staff to seek higher gross profits over volume.

11 182. As with the fleet salespeople, Folsom Chevrolet's retail sales personnel are primarily
12 paid on commission, based on the gross profits they earn. (RT Vol. 8, 64:12-65:16 (L. Crossan).)
13 Although there are tiers to this structure, it simply allowed them to capture a "higher percentage of
14 the commission," *i.e.*, more of the gross. (*Id.*) The actual numbers range from 20 to 30 percent of
15 gross profit. (RT Vol. 8, 104:20-105:7 (L. Crossan).) Mr. Stockton opined that this structure was
16 risk-averse; in other words, the salesmen were "not necessarily incentivize[d] to make aggressive
17 sales." (RT Vol. 7, 149:24-150:4 (Stockton).) Larry Crossan, the general manager, was also
18 compensated by "a percentage of the gross" on the front end, including new vehicle sales. (RT Vol.
19 8, 40:4-10 (L. Crossan).)

20 183. An indication that something may have been awry was noted at the June 2014 POP
21 meeting, where it became clear that Folsom Chevrolet's pay structure, in combination with generally
22 high gross profits, were resulting in unusually high compensation for Folsom Chevrolet's
23 salespeople on a per-unit basis. At the time of the POP meeting, Folsom Chevrolet paid out \$1,346
24 in sales compensation per retail unit, while the Sacramento DMA average was just \$703.
25 (R263.069.) This may explain why, after Mr. Kaestner arrived and altered the dealership's pay plans
26 to focus more on volume and less on gross profits, there was "almost . . . a hundred percent turnover
27 with the sales force." (RT Vol. 8, 145:21-147:5; Vol. 9, 243:9-25 (Kaestner).)

28 4. High Gross Profits Reduced Sales at Folsom Chevrolet

1 184. There was widespread agreement at the hearing that customers are particularly
2 sensitive to vehicle pricing, particularly in the Internet era. Larry Crossan, for example, testified that
3 “the Internet has made customers more educated about pricing,” and “because of the Internet,
4 customers are willing to drive a hundred miles to save a hundred bucks.” (RT Vol. 8, 90:6-16 (L.
5 Crossan).) He further testified that “two of the most important factors for a dealership [are] product
6 pricing and product availability.” (*Id.*) Mr. Escalante concurred, noting that customers today “are
7 more price sensitive, because they have so much information at their finger tips to make an informed
8 decision of where are they getting the best deal.” (RT Vol. 2, 406:2-11 (Escalante).)

9 185. As a result, higher gross profit typically leads to fewer sales. (RT Vol. 1, 131:1-22
10 (Stinson).) Mr. Escalante believes this is true for Folsom Chevrolet specifically, testifying that “sales
11 went elsewhere that could have been had because of holding [for] gross.” (RT Vol. 2, 406:17-21
12 (Escalante).)

13 186. Interestingly, the dealership was perceptibly more aggressive with its pricing in 2016,
14 and earned by far its lowest gross profits per unit.³ (P185 (Stockton Report) at 80, App. p. 12.)
15 However, because the dealership sold more units, it qualified to earn an additional \$543,927 in
16 incentives from General Motors under the SFE program, which rewards volume sales. (RT Vol. 1,
17 192:12-199:4 (Stinson); P185 (Stockton Report) at 80, App. p. 12.) These SFE incentives effectively
18 replaced *all* of the gross profit the dealership “lost” by pricing its vehicles more competitively. (P185
19 (Stockton Report) at 80, App. p. 12.) As a result, in 2016, Folsom Chevrolet had its most profitable
20 year since the recession, recording a profit of \$1,639,756, on top of the \$397,302 dividend it paid to
21 cover Mr. Crossan’s personal income taxes. (*See* R243E.001 (2014 Operating Report) at line 63.)

22 **C. Folsom Chevrolet Failed to Implement a Fully-Functional BDC**

23 187. Another reason why Folsom Chevrolet struggles to make sales is that it lacks a fully
24 functional BDC, or Business Development Center. A BDC is designed to generate appointments for
25 the store by following up on potential sales and service leads. (RT Vol. 2, 376:3-14 (Escalante).) At
26

27 ³ Even with that reduction, the dealership nonetheless still charged approximately 135%
28 more than other California Chevrolet dealers in gross profits. (R244.080 (Farhat Report).)

1 the simplest level, it interfaces with potential customers: “if a customer calls in and they want to see
2 a red Silverado,” the BDC will “learn more about the customer, learn more about the colors and
3 options, and schedule an appointment with the customer where it’s convenient for the customer.”
4 (RT Vol. 2, 279:12-281:14 (Stinson).) On the service side, it might help customers who call in to
5 schedule oil changes and things of that nature. (*Id.*)

6 188. However, a good BDC is also proactive, working from manifest lists—many of which
7 GM provides—to generate additional sales. For example, a BDC may call a customer whose lease is
8 ending shortly, and alert them that they can qualify for additional incentives if they return the lease
9 early. (RT Vol. 2, 279:12-281:14 (Stinson).) It may contact a non-GM customer that research
10 indicates is in the market for a new vehicle and considering a Chevrolet product, and set an
11 appointment for a test drive. (RT Vol. 2, 377:10-378:3 (Escalante).) Or it may contact a Folsom
12 Chevrolet customer who has not brought their vehicle in for service within the first six years, and
13 notify them that they qualify for free maintenance for their vehicle under warranty. (RT Vol. 2,
14 358:7-360:3 (Deprez); Vol. 2, 378:6-11 (Escalante).)

15 189. Whatever the methods used, the key is that the BDC makes and then confirms
16 customer appointments. (RT Vol. 2, 279:12-281:14 (Stinson).) 18 to 28 percent of appointments are
17 converted into sales, which means 12-15 appointments would allow Folsom Chevrolet to meet its
18 simplified goal of three sales per day. (RT Vol. 2, 376:22-377:2 (Escalante).) It also allows the
19 dealership to predict their upcoming sales with high accuracy. (RT Vol. 2, 376:15-21 (Escalante).)
20 As Mr. Escalante noted, appointments are increasingly necessary in a world where consumers can
21 use technology to “grab the information to make a decision and go to a store as opposed to visiting
22 the store blindly and just showing up and asking, hey, I’m looking for a truck.” (RT Vol. 2, 378:12-
23 25 (Escalante).) Although that used to be the industry practice, “now, more than ever, it’s [about] the
24 BDC where you have somebody actively reaching out to the customer and trying to set an
25 appointment to bring in the traffic, if you will, into the s[t]ore.” (*Id.*)

26 190. The problem is that “a lot of sales people don’t like to make [outbound] calls.” (RT
27 Vol. 2, 279:12-281:14 (Stinson).) As a result, it requires discipline and coordination to ensure that
28 appointments are being set and confirmed. (*Id.*) However, Folsom Chevrolet experienced frequent

1 turnover at the BDC manager ("BDM") position, and failed to hold its sales consultants accountable
2 for setting and confirm appointments. (RT Vol. 2, 379:1-11 (Escalante).) As a result, it did not
3 consistently set appointments to drive traffic to the store. (RT Vol. 2, 379:20-22 (Escalante).)
4 Furthermore, Folsom Chevrolet's managers did not consistently call to confirm that claimed
5 appointments had actually been made, a practice employed by successful dealerships such as John L.
6 Sullivan. (RT Vol. 2, 380:10-381:17 (Escalante).)

7 191. The lack of a functional BDC was a frequent topic of conversation with Folsom
8 Chevrolet. (*See* RT Vol. 6, 203:2-204:3 (M. Crossan) ("there were certainly an emphasis on a
9 BDC").) Mr. Escalante stated that "one of the main subjects that we had discussed on a frequent
10 basis was the creation of a BDC and BDM, and generating appointments consistently." (RT Vol. 2,
11 411:1-11 (Escalante).) It was also a primary suggestion made by Maritz, the third-party consultants
12 hired to assist the dealership. (RT Vol. 2, 410:1-13, 450:14-451:2 (Escalante).) However, the
13 dealership never fully implemented the suggestions, in part because Mr. Shirley did not fulfill the
14 tasks assigned to him. (RT Vol. 2, 410:17-411:16 (Escalante).)

15 192. Mr. Escalante grew so frustrated by the dealership's poor follow-through that he kept
16 notes of discussions from several meetings in July and August 2015. (R254; RT Vol. 2, 382:3-
17 382:22 (Escalante).) The notes reflect that on July 10th, the dealership had no BDM (BDC
18 Manager), and he spoke with Mr. Crossan about adding one. (R254.) Mr. Escalante further stated
19 that "[t]he current poor appointment rates followed by challenged sales seems to be the primary
20 reason traffic is so slow." (*Id.*) Notes from the following two weeks indicate that no BDM was hired,
21 and "[n]o ETA" was offered as to when one would be hired." (*Id.*) These conversations occurred
22 during the cure period, when the dealership should have felt a sense of urgency to hire a BDM. (RT
23 Vol. 2, 384:1-7 (Escalante).) Mr. Escalante also noted that he had similar discussions both before
24 and after those dates. (RT Vol. 2, 384:8-19 (Escalante).)

25 193. The dealership's failure to implement an effective BDC can also be seen in the
26 quarterly contact meetings from General Motors. Taken as a whole, they demonstrate both GM's
27 continued emphasis on the BDC and the dealership's inability to maintain one. (*See* R212.002 (Aug.
28 4, 2014 Ltr.) ("BDC implementation process at 85% complete. BDC manager onboard, Peter

1 Allen.”); R215.002 (Oct. 31, 2014 Ltr.) (“Starting November 1, 2014 a new BDC Manager will be
2 onboard to help increase appointments.”); R217.002 (Jan. 30, 2015 Ltr.) (“Continued training and
3 verification by newly hired BDC manager”); R229.003 (Aug. 21, 2015 Ltr.) (“Dealer contacted
4 Traver Technologies⁴ to assist with the re-implementation of proper BDC functions and effective
5 appointment process”); R231.002 (Sept. 30, 2015 Ltr.) (“BDC has Traver refresher training to be
6 scheduled but has not yet been completed”); R233.002 (Dec. 1, 2015 Ltr.) (“Dealership continues to
7 increase emphasis on BDC process. . . . Additional BDC training is scheduled for January 2016.”).)

8 194. Folsom Chevrolet continues to struggle with its BDC today. Mr. Kaestner testified
9 that when he took over in May 2017, he had to “give the sales team a different mindset in retrospect
10 of how the industry is now, in 2017.” (RT Vol. 9, 226:14-227:1 (Kaestner).) He explained that this
11 meant making “some changes to designate certain personnel to monitor what we call leads that come
12 through the Internet department, as opposed to where we were handing them out and not really
13 holding one person accountable for these leads.” (RT Vol. 9, 227:2-18 (Kaestner).)

14 **D. Folsom Chevrolet’s Customers were not Satisfied**

15 195. Another cause of poor sales performance at the dealership was its inability to achieve
16 acceptable levels of customer satisfaction. Obviously, this is problematic on its own under the
17 contractual requirements of the Dealer Agreement. (R201.011 § 5.3.) However, customer
18 satisfaction is also a critical aspect of sales performance, because it affects the retention of existing
19 customers. (RT Vol. 2, 420:2-7 (Escalante).) Given the advent of third-party review sites like Yelp,
20 it may also influence whether a customer chooses to visit the dealership at all. (RT Vol. 2, 259:15-
21 260:18 (Stinson).)

22 196. Customer satisfaction is primarily measured by General Motors in the form of
23 customer surveys. (RT Vol. 1, 99:22-100:12 (Stinson).) There are two different surveys that are
24 administered: The PDS (Purchase and Delivery Satisfaction) survey relates to a customer’s
25 experience during the purchase process for a new vehicle, and the SSS (Service Satisfaction Score)
26

27 ⁴ Traver is a BDC agency “that was hired for a time but left.” (RT Vol. 2, 380:10-20
28 (Escalante).)

1 survey relates to a customer's experience when their vehicle needs warranty repair or maintenance.
2 (RT Vol. 1, 100:14-101:7 (Stinson).) This is comparable to the practices employed by other
3 manufacturers. (RT Vol. 5, 125:13-126:14 (Farhat).)

4 197. Evidence at the hearing showed that Folsom Chevrolet scored below the Regional
5 average in PDS every year from 2012 to 2017. (*See* R268.001-6.) Furthermore, it exhibited a
6 noticeable negative trend. Mr. Stockton's graph of the dealership's PDS scores shows that they
7 declined every year starting in 2013, falling ever further away from the Regional average. (P185 at
8 83, App. p. 15.) And while the dealership typically performed better in SSS, it did extremely poorly
9 in 2014, scoring just a 65.4—well below the Region average. (R268.004; *see also* RT Vol. 1,
10 156:22-25 (Stinson) (65 is a low score); RT Vol. 2, 356:6-7 (Deprez) (same).)

11 198. These measures directly influence a dealership's retail sales capabilities. Mr. Stinson
12 described PDS as "a big indicator of future sales." (RT Vol. 1, 110:10-111:4 (Stinson).) Mr.
13 Escalante testified that he has observed that a deteriorated PDS has "a correlation with lower sales."
14 (RT Vol. 2, 420:8-22 (Escalante).) And Mr. Meier stated that "CSI performance, given customers do
15 have choice, will impact the number of consumers that you can attract to the dealership." (RT Vol. 4,
16 41:23-42:8 (Meier).) Thus, while "word of mouth of customers satisfied at the dealership is
17 instrumental in continuing to attract new consumers in a community . . . CSI performance that is
18 below regional average will have a pretty significant effect on the ability to attract and retain
19 customers." (*Id.*)

20 199. The effects of the dealership's poor customer satisfaction also show up in dealer
21 customer loyalty reports. (*See* R241A-E.) These reports show that Folsom Chevrolet continuously
22 struggled to retain customers; between February 2012 and May 2015, its 3 month trend never once
23 reached the average of the District, Zone, Region, or Nation. (R241A-D.) In 2014—the same year its
24 SSS scores cratered—Folsom Chevrolet's dealer loyalty rate was as low as 5 or 6 percent. (RT Vol.
25 2, 429:15-24 (Escalante).) In other words, only 1 in 20 customers who purchased a vehicle from
26 Folsom Chevrolet returned to purchase one there again. (*Id.*)

27 200. The loyalty reports from this period also reflect that, while Folsom Chevrolet was
28 losing customers to many dealerships, it saw a large number of defections to other Sacramento

1 Chevrolet dealerships. (R241B.002; R241C.002; RT Vol. 2, 427:3-428:1, 429:25-430:8 (Escalante).)
2 In 2014, for example, the number one model of vehicle purchased by customers who defected from
3 Folsom Chevrolet, by far, was the Chevrolet Silverado. (R241C.002.) In fact, there were as many
4 Silverados purchased by defecting customers (27) as the next three models combined. (*Id.*)

5 **E. Folsom Chevrolet Failed to Hold its Personnel Accountable**

6 201. The final cause of poor sales performance at Folsom Chevrolet identified at the
7 hearing was a failure to hold its personnel accountable. This effect can be seen at every level of the
8 dealership's operations, from its inability to rein in Mr. Schoonbrood's harmful but lucrative fleet
9 practices (RT Vol. 1, 201:17-24 (Stinson) ("I just felt that the fleet manager had the most control of
10 the dealership")), to the high gross profits—and therefore compensation—earned by its sales staff, to
11 the inability to implement a functional BDC and consistently make appointments. (RT Vol. 2,
12 279:12-281:14 (Stinson) ("a lot of sales people don't like to make [outbound] calls").) It was also a
13 problem that hampered Folsom Chevrolet's ability to implement the suggestions made by General
14 Motors and Maritz. (RT Vol. 2, 414:8-14 (Escalante).)

15 202. The problem was exemplified by the tenure of Mr. Shirley, the general sales manager,
16 who frustrated progress at the dealership by agreeing to tasks during Maritz meetings—such as
17 creating a BDC, hiring a CSI manager, or reviewing leads and manifest lists—he then failed to
18 implement. (RT Vol. 2, 410:21-412:13 (Escalante).) GM discreetly suggested that Folsom Chevrolet
19 consider a change at the position, but it took far too long for the dealership to act. (RT Vol. 2, 413:3-
20 17 (Escalante).) According to Mr. Crossan, by the time Mr. Shirley was let go, he had openly
21 stopped doing his job. (RT Vol. 8, 135:13-136:4 (M. Crossan).) It appears even Mr. Shirley agreed it
22 was time for him to go; when he was fired, he told Mr. Crossan that he "should have let him go six
23 months earlier." (RT Vol. 8, 136:5-11 (M. Crossan).) After Mr. Shirley was finally let go, the
24 dealership experienced positive changes to its website, marketing practices, phone calls and leads—
25 and ultimately, improved sales. (RT Vol. 9, 142:2-23, 157:19-159:2 (D. Crossan).)

26 203. The problem can also be seen in the testimony of two relative newcomers to Folsom
27 Chevrolet, Brian Kaestner and Lisa Castro, the dealership's controller. Mr. Kaestner testified that
28 when he started, the dealership had "a lot of employees with tenure." (RT Vol. 9, 255:7-11

1 (Kaestner).) However, after he altered the dealership's pay plans to focus more on volume and less
2 on gross profits—and to include performance requirements—there was “almost . . . a hundred
3 percent turnover with the sales force.” (RT Vol. 8, 145:22-147:5; Vol. 9, 243:9-25 (Kaestner).)

4 204. Ms. Castro, meanwhile, testified that when she joined Folsom Chevrolet in November
5 2015, she perceived “complacency” among certain personnel at the dealership. (R250C.037-38
6 (Depo Des. of L. Castro), 33:25-10, 35:4-36:1.) That complacency was concentrated in the “variable
7 ops department,” which is the used and new vehicle sales department. (*Id.*) By way of example, Ms.
8 Castro testified that “[t]he sales manager just did not do the daily duties, the back to basics that are
9 expected of a sales manager,” and was instead just “[w]aiting for a car deal.” (*Id.*)

10 **IV. GENERAL MOTORS' PROCESSES AND PROCEDURES**

11 205. As with the causes of Folsom Chevrolet's performance, General Motors does not
12 need to prove the reasonableness of its practices in order to establish good cause for termination. To
13 the extent Folsom Chevrolet has attacked these processes and procedures, however, it is nonetheless
14 worth exploring the reasonableness of several key practices.

15 **A. General Motors' Inventory Allocation Process is Reasonable**

16 206. Folsom Chevrolet has argued that it was allocated insufficient inventory to meet its
17 sales requirements. However, evidence at the hearing, including the testimony of Mr. Bob Muiter,
18 Director of GM Order Fulfillment for all of North America, established that GM's process is
19 reasonable and that Folsom Chevrolet was allocated sufficient inventory. (RT Vol. 3, 7:4-8:11
20 (Muiters).)

21 **1. The Allocation Process**

22 207. GM utilizes a math-based formula to determine which dealers should be allocated, or
23 offered, vehicles during each upcoming production run. (RT Vol. 3, 11:19-13:20 (Muiters).) There
24 are several steps to this process, and each offers dealerships the opportunity to obtain more or less
25 product as needed.

26 **a. Phase 1: Consensus**

27 208. The first phase of allocation is the consensus process, wherein GM makes an initial
28 offer of vehicles to each dealership. (R252; *see also* R278 (PowerPoint explanation of process).) The

1 first step is to calculate the Available Days' Supply (ADS) for each dealership, which is determined
2 by dividing a dealership's total availability of product (*i.e.*, units in stock or in transit to the dealer)
3 by its average daily sales rate over the past 90 days. (RT Vol. 3, 11:19-13:20 (Muitter); R278.002.)
4 That number is then adjusted by travel time from the plant. (*Id.*) That proximity adjustment is based
5 on the empirical travel time for GM logistics to deliver vehicles, which is updated every month. (RT
6 Vol. 3, 16:15-17:2 (Muitter).)

7 209. Thus, a dealership with 8 vehicles in stock, and an average daily sales rate of .2
8 vehicles per day, has an ADS of 40 days, because it would take 40 days on average to sell 8 vehicles
9 at that rate. (R278.003.) Meanwhile, a dealer with only 4 vehicles in stock, selling .3 vehicles per
10 day, has an ADS of 13 days—meaning it will run out of inventory sooner, on average. (*Id.*)
11 Although this calculation ignores travel time, that would also be taken into account. (RT Vol. 3,
12 18:10-19:7 (Muitter).)

13 210. As reflected in R278.003-7, General Motors then begins allocating vehicles to the
14 dealers with the lowest ADS, one unit at a time. (RT Vol. 3, 26:21-28:17 (Muitter).) After each unit
15 is allocated, the receiving dealer's ADS is recalculated, and the next-lowest ADS dealer (which may
16 be the same one) receives the next unit. (*Id.*) When all of the available units are allocated, the ADS
17 of the dealer who received the final unit becomes the "ADS Bar." (R278.008.) Any dealer with a
18 starting ADS below the ADS Bar will have received at least one unit; any dealer with a starting ADS
19 above the ADS Bar will not. (RT Vol. 3, 20:24-22:20 (Muitter).) The ADS Bar is published with
20 each cycle, so that dealers understand why they did or did not receive allocation. (*Id.*)

21 211. This first part of phase 1 of the allocation process is called estimated shipments. The
22 result of this system is to equalize product availability across the dealer network. (*See* 278.009-10
23 (showing equalization up to the ADS Bar); RT Vol. 3, 28:24-30:17.)

24 212. After dealerships are offered vehicles by GM, they next engage in consensus, wherein
25 they choose whether to (1) accept all of the units offered; (2) accept some or none of the units
26 offered; or (3) accept the units offered and request more. (RT Vol. 3, 30:25-32:16 (Muitter).) This is
27 a dealer business decision based upon their existing inventory. (*Id.*) After each dealer makes that
28 decision, any declined allocation units are placed back into a pool, and re-allocated based on ADS to

1 any dealer that requested additional vehicles. (*Id.*) This is the end of the first phase, which is
2 generally performed twice per month. (RT Vol. 3, 32:17-21 (Muiters).)

3 b. Phase 2: Dealer Order Submission Process

4 213. Twice per month, after the consensus process is complete, each dealership receives a
5 document that describes its final allocation. (RT Vol. 3, 49:16-51:1 (Muiters).) The dealer then has to
6 place orders for the specific vehicles it wants (trim package, color, *etc.*), a process which occurs
7 every week. (*Id.*) This process is known as the Dealer Order Submission Process (“DOSP”). During
8 DOSP, as in consensus, the dealership again has flexibility in how many vehicles it takes, with the
9 option to (1) order all of the units offered; (2) order some or none of the units offered; or (3) order
10 the units offered and request more. (*Id.*) And once again, any declined units are re-allocated to those
11 dealerships that requested more units. (*Id.*)

12 **2. Business Elite Supplemental Allocation**

13 214. In addition to the regular allocation process, General Motors also runs a special
14 allocation for Business Elite dealerships on three vehicle lines: Silverado light-duty regular cab,
15 Silverado heavy-duty, and Express Van. (RT Vol. 2, 334:3-7 (Ryan).) The program provides
16 “incremental volume” to dealerships, in that it takes from a pool of those vehicles and offers
17 allocation only to Business Elite dealers, using the same system described above. (RT Vol. 3, 110:5-
18 111:6 (Muiters).)

19 215. This allocation is designed for small business, “non-fleet” customers, such as florists,
20 landscapers, and the like. (RT Vol. 3, 117:4-19 (Muiters).) “[T]he intent of the design and the
21 commercial allocation is not to satisfy fleet. We have a fleet process to satisfy fleet.” (*Id.*) For this
22 reason, the Business Elite allocation is for vehicles that are “useful in commercial applications.” (RT
23 Vol. 3, 111:2-6 (Muiters).) While dealers can customize orders from this allocation just as in the
24 ordinary allocation process, “[a] lot of the volume that gets delivered . . . is lower trim level
25 Silverados.” (RT Vol. 2, 350:21-351:23 (Ryan).)

26 **3. GM Makes Additional Vehicles Available Outside the Allocation Process**

27 216. In addition to the regular and Business Elite allocation, General Motors also sets aside
28 up to 15% of its production under a program known as strategic target market initiative—“STMI.”

1 (RT Vol. 3, 36:22-37:18 (Muter).) The 15% cap is based on state law. (*Id.*) The STMI vehicles are
2 then provided to each Region for discretionary distribution, because the allocation “formula can’t
3 necessarily accommodate all the variables in the market.” (*Id.*)

4 217. STMI vehicles can be used for promotions and events occurring within the Region.
5 (*Id.*) It also serves as a safety valve, because the Region can use those vehicles to help dealerships
6 who are struggling with inventory for reasons outside of their control. (RT Vol. 3, 96:22-98:24
7 (Muter).) However, Mr. Muter took care to point out that STMI distribution cannot “impact
8 negatively any adjacent dealer,” meaning it cannot “favor one deal[er] over another.” (*Id.*)

9 218. GM also provides supplemental allocation to dealers in the performance improvement
10 program, which Folsom Chevrolet received when it was provided the Notice of Breach. (*Id.*)

11 **4. Folsom Chevrolet had Sufficient Inventory to Meet its Sales**
12 **Requirements**

13 219. Folsom Chevrolet has alleged that it did not have sufficient inventory to meet its sales
14 requirements. However, evidence at the hearing showed that not only did it have sufficient
15 inventory, it turned down or failed to request hundreds of additional units it could have received. The
16 claim that it was not provided with enough inventory is therefore unavailing.

17 a. Folsom Chevrolet Generally Maintained a Sufficient ADS

18 220. As an initial step, Mr. Farhat analyzed Folsom Chevrolet’s average monthly ADS
19 from 2013-June 2016. (R244.079.) The analysis revealed that Folsom Chevrolet typically maintained
20 at or above a 200 days’ supply of vehicles until June 2016, when average ADS dropped somewhat to
21 a still-reasonable 143 days. (*Id.*) In 2014, the dealership had an average monthly ADS of 266
22 vehicles. (*Id.*)

23 221. According to Drew Crossan, these numbers typically represent more than enough
24 inventory: “any car that we can have 193 days’ supply, I can replace that car in that time frame,
25 hopefully, if all things go to plan. So I don’t need a 260-day supply.” (RT Vol. 9, 115:8-116:9 (D.
26 Crossan).) Mr. Farhat agreed that, given those numbers, “it’s hard to believe that there was a lack of
27 inventory at the dealership.” (RT Vol. 5, 120:7-121:9 (Farhat).) Mr. Escalante agreed, testifying that
28

1 in his years of experience in calling on the dealership, GM allocated enough vehicles for Folsom
2 Chevrolet to be successful. (RT Vol. 2, 386:19-22 (Escalante).)

3 b. Folsom Chevrolet's Actions During Allocation Indicate it had
4 Sufficient Inventory

5 222. Another way of looking at inventory is to examine the dealership's actual practices
6 when it came to allocation. Mr. Muiter did just that analysis, and he determined that Folsom
7 Chevrolet's actions indicate it was generally comfortable with its inventory levels during 2012-2016.
8 (See R276.002-3.)

9 223. The first portion of Mr. Muiter's analysis shows Folsom Chevrolet's behavior during
10 the consensus process. (R276.002.) The numbers in red indicate declined units of allocation,
11 meaning that Folsom Chevrolet chose not to obtain more vehicles of that type. (RT Vol. 3, 35:14-
12 40:21 (Muter).) That sums to 466 units over those 5 years. (R276.002; RT Vol. 3, 45:10-18
13 (Muter).)

14 224. The last row, meanwhile, reflects the percentage of allocation cycles in which Folsom
15 Chevrolet requested at least one additional unit of that type. (RT Vol. 3, 35:14-40:21 (Muter).)
16 Thus, for the Chevy Bolt—which Drew Crossan called the “second hottest product” right now (RT
17 Vol. 9, 105:3-22 (D. Crossan))—the dealership requested additional allocation during every
18 production cycle it was offered in 2016. (See R276.002.) But across all vehicles and all 5 years, it
19 only requested additional allocation about half the time. (*Id.*; RT Vol. 3, 48:13-49:6 (Muter).) When
20 it did request extra units, however, it was often rewarded, earning an extra 571 units over that period
21 of time.⁵ (R276.002.)

22 225. Mr. Muiter next looked at Folsom Chevrolet's behavior during Phase 2, the Dealer
23 Order Submission Process. (R276.003.) Here, the dealership rarely declined units it had previously
24 accepted, turning down only 15 vehicles over 5 years. (*Id.*; RT Vol. 3, 52:25-53:19 (Muter).)
25 However, it also rarely requested additional inventory, submitting such a request just 38% of the
26

27 ⁵ As Drew Crossan put it, “[y]ou can ask for extra allocation. If it's available, they will give
28 it to you.” (RT Vol. 9, 107:1-6 (D. Crossan).)

1 time. (RT Vol. 3, 38:6-23 (Muiters).) Thus, 62 percent of the time, Folsom Chevrolet chose not to try
2 to obtain any additional units during the weekly order process. (*Id.*) But again, when it chose to do
3 so, it was often rewarded, earning 210 extra units over those 5 years. (R276.003.)

4 226. Mr. Muiters's assessment was that Folsom Chevrolet therefore felt it generally had
5 sufficient inventory; otherwise, it would have raised its hand to ask for more allocation. (RT Vol. 3,
6 48:13-49:6, 54:20-25 (Muiters).) It clearly understood how to ask for more allocation or decline
7 unneeded vehicles if it chose. (RT Vol. 3, 55:1-11 (Muiters).) Mr. Muiters therefore rejected the claim
8 that the dealership was not allocated enough vehicles to be successful:

9 [I]t would be my conclusion that if indeed the dealer was short of
10 desired availability, the dealer would have been more aggressive in
11 asking for product. The times he asked for product, you can't
12 guarantee you're going to get them each and every time, but the dealer
13 was rewarded sufficiently each of those instances. That would suggest
14 to me that he didn't need any more product. At the time, they were
15 making the decision, they felt they had enough product.

14 I think, based on today in hindsight, maybe they'd now feel they didn't
15 have enough product, but their actions, their business decisions at the
16 time suggested they were satisfied with the product that they had.

16 (RT Vol. 3, 55:21-56:15 (Muiters).)

17 c. A Review of Folsom Chevrolet's 2015 Inventory Indicates it had
18 Sufficient Inventory to Meet its Sales Goals

19 227. In addition to his analysis of Folsom Chevrolet's allocation practices from 2012-
20 2016, Mr. Muiters also performed a deep dive into Folsom Chevrolet's inventory in 2015 specifically,
21 the year of the cure period. (*See* R277.002.) That analysis begins with a review of information
22 obtained from the 2015 Sales Performance Review, such as the dealer's sales, its expected sales, and
23 the variance from expected. (RT Vol. 3, 60:2-61:2 (Muiters).) In 2015, the dealership needed to make
24 1,142 sales total, or 490 sales more than the 788 it made, to meet state average and 100 RSI. (*Id.*)

25 228. Mr. Muiters then reviewed the dealership's actual availability of vehicles during 2015.
26 It began the year with 389 vehicles, and then received 885 units over the course of the year through
27 the allocation process, as well as 21 extra units through incremental DOSP allocation. (RT Vol. 3,
28 61:3-62:11 (Muiters).) The 885 units represents the vehicles actually accepted by the dealership

1 during the consensus process, as column 8 shows it also turned down 141 units of allocation. (RT
2 Vol. 3, 102:14-103:23 (Muiters).) Thus, purely from vehicles already in stock or made available to it,
3 the dealership had 1,295 vehicles during 2015, which was already more than enough to meet its
4 obligation of 1,142 sales. (RT Vol. 3, 61:3-62:15 (Muiters).)

5 229. However, Folsom Chevrolet had the opportunity to obtain additional vehicles during
6 2015 as well. As an initial matter, it declined 141 units of allocation that year, including 4 Silverado
7 1500s—a vehicle it missed its sales objective for by over 200 units. (R277.002.) During the dealer
8 order submission process, it also declined 5 units it had previously accepted. (RT Vol. 3, 62:16-
9 63:25 (Muiters).)

10 230. On top of those 146 units, Folsom Chevrolet also had the opportunity to request
11 additional inventory 9 times during the Estimated Shipments process. (*Id.*) That does not mean it
12 could have obtained only 9 vehicles; rather, it could have obtained a minimum of 9 vehicles, and
13 possibly many more. (*Id.*) And on top of that, it had the opportunity to obtain an additional 94 units
14 by requesting additional inventory during the DOSP phase, including multiple Camaros, Cruzes, and
15 Silverados. (*Id.*; R277.002.)

16 231. Summing up all of these results shows that Folsom Chevrolet had the opportunity to
17 obtain at least 249 more units than it obtained during 2015, and possibly more. (*Id.*) The total
18 number of vehicles available to it in 2015 was therefore 1,544, more than four hundred units more
19 than was needed for Folsom Chevrolet to meet 100 RSI. (*Id.*) Mr. Muiters therefore concluded that,
20 “[b]ased on the data, there was adequate inventory to meet the requirement.” (RT Vol. 3, 65:9-22
21 (Muiters).) To the extent the dealership declined to take advantage of those opportunities, it reflects
22 business decisions made by Folsom Chevrolet, not a failure to supply vehicles by GM. (RT Vol. 3,
23 108:17-110:4 (Muiters).)

24 5. General Motors Provided Folsom Chevrolet with a High Level of 25 Inventory Support

26 232. Folsom Chevrolet has complained that, even if it received sufficient inventory, it had
27 to deal with issues like constraints in ordering that affected its business. However, this is an issue
28 that affects all Chevrolet dealers equally. (RT Vol. 9, 148:13-21 (D. Crossan).) By contrast, there is

1 one area where Folsom Chevrolet was significantly favored over its competing dealers: discretionary
2 support from General Motors.

3 233. For example, Mr. Escalante testified that he provided Folsom Chevrolet with an
4 unusually high level of attention and support, because he was “very interested in helping them
5 improve their sales and their customer satisfaction scoring.” (RT Vol. 2, 373:8-15 (Escalante).) As a
6 result, Mr. Escalante noticed when Folsom Chevrolet turned down an allocation of 10 pickup trucks,
7 and convinced them to take the vehicles. (R254; RT Vol. 2, 387:14-388:6 (Escalante).) This was an
8 oversight on Drew Crossan’s part that Mr. Escalante noticed and corrected. (RT Vol. 9, 128:19-
9 129:9 (D. Crossan).)

10 234. More concretely, both Mr. Escalante and Mr. Ryan routinely steered available STMI
11 units to Folsom Chevrolet when possible. In fact, of Mr. Ryan’s 30 Business Elite dealers, Folsom
12 Chevrolet “probably . . . received the most [STMI] out of any of my dealers in the last three years.”
13 (RT Vol. 2, 336:3-19 (Ryan).) A review of Mr. Muiter’s chart confirms that this was a significant
14 benefit to the dealership: from 2012 to 2016, the dealership received an additional 796 units under
15 the STMI program, a nearly 30% increase over its initial allocation of 2,685 units. (R277.002.)

16 **B. General Motors’ Method of Assigning APRs and AGSSAs is Reasonable**

17 235. At the hearing, Folsom Chevrolet challenged the reasonableness of the AGSSA
18 assigned to it, asserting that the territory is too large for it to cover effectively. However, the
19 evidence adduced showed that GM’s process for assigning territory is reasonable, and the AGSSA
20 given to Folsom Chevrolet is, in fact, properly assigned.

21 **1. General Motors’ Method of Assigning APRs and AGSSAs is Reasonable**

22 236. As explained above (*see supra*, § I(B)), General Motors assigns census tracts to
23 dealerships using a consistent, objective process based on geographic proximity and customer
24 convenience. Its drive time metrics take into account speed limits, and the persons actually doing the
25 review are also able to visually review road networks and other map data. (RT Vol. 3, 226:21-227:13
26 (Giguere).)

27 237. Thus, although Folsom Chevrolet is able to sell into the entire Sacramento metro
28 area—and indeed, the country—it is only responsible for covering those tracts for which it is

1 objectively the closest dealer. (RT Vol. 3, 137:4-21 (Giguere).) GM puts significant effort into
2 maintaining these AGSSA definitions, going as far as to update the territories of every dealership in
3 the country during the decennial Census. (R206.001 (Jan. 22, 2013 Notice of Tentative Decision).)

4 238. General Motors provides many opportunities for dealers to become involved in the
5 configuration of their territory. Dealers may generally request a review of their territory at any time,
6 as Folsom Chevrolet did in July 2015. (*See* R230 (Aug. 21, 2015 Ltr.) (responding to July 2015
7 letter).) In addition, it provides notifications to dealers whenever any tentative definition changes are
8 considered, even those which result in no effective change. (RT Vol. 3, 159:25-162:13 (Giguere);
9 *compare* R206.009 (then-Current AGSSA) *with* 11 (Proposed AGSSA).) Dealerships then have both
10 the contractual and statutory right to provide information and protest those changes. (*See* R201
11 (Dealer Agreement) at 7 § 4.2; Cal. Veh. Code § 3060(b)(1).)

12 2. Folsom Chevrolet Failed to Timely Object to any Assignment of Territory

13 239. As described in the Timeline, Folsom Chevrolet was notified during the June 2009
14 bankruptcy process that the GM dealer network would soon be subject to consolidation of “a
15 significant number of dealers.” (R202.001 (Participation Agreement).) And indeed, two Chevrolet
16 dealers in Folsom’s area went out of business during the bankruptcy process. (RT Vol. 3, 204:25-
17 205:19 (Giguere).) Those dealerships were located in Shingle Springs and in Jackson, east and south
18 of Folsom proper. (*Id.*) Mr. Crossan learned that these dealerships would not be going forward
19 within about six months of receiving the Participation Agreement. (RT Vol. 6, 169:10-22 (M.
20 Crossan).)

21 240. Folsom Chevrolet was then notified in December 2010 that its AGSSA would be
22 expanded to better reflect the opportunity available to it, given the loss of neighboring dealers. (*See*
23 R204.001 (Dec. 17, 2010 Notice of Proposed APR and AGSSA Changes).) The new AGSSA, which
24 is largely the same as its current territory, included several large but sparsely populated tracts,
25 including some in the former Jackson dealer’s AGSSA, but not the town of Jackson itself. (*Id.*; RT
26 Vol. 10, 62:11-18 (Farhat).)

27 241. Folsom Chevrolet did not respond to the December 2010 tentative notification, nor to
28 another notification sent in April 2011, which took into account the information that other dealers

1 did send. (RT Vol. 8, 179:15-19 (M. Crossan); R205 (Apr. 22, 2011 Tentative Decision of APR and
2 AGSSA Changes); RT Vol. 3, 155:9-11 (Giguere).) Folsom Chevrolet also did not protest the
3 finalized new assignment, which was made in June 2011, even though the first words on the notice,
4 in bold font, alerted it to its right to protest. (R257 (June 29, 2011 Final Decision of APR and
5 AGSSA Changes).)

6 242. Folsom Chevrolet also made no timely response to GM's notification that its AGSSA
7 definition was being updated following the 2010 census. (RT Vol. 3, 159:25-162:13 (Giguere).)
8 However, it did ultimately send a letter objecting to GM's purported "tentative decision to
9 significantly expand Folsom Chevrolet's APR and AGSSA, even though the dealership had had that
10 territory for approximately a year and half by that point. (R281.002; RT Vol. 8, 184:18-185:12 (M.
11 Crossan).) Even then, Folsom Chevrolet's letter failed to convey any useful feedback, as it objected
12 to territory which was not actually within its AGSSA. (See R281.001 (mapping locations against
13 AGSSA); RT Vol. 3, 164:5-165:20 (Giguere).)

14 243. General Motors did agree to review the territory again, and made two census tract
15 changes at the fringe of Folsom Chevrolet's territory. (R208 (May 31, 2013 Notice of Proposed APR
16 and AGSSA).) Because of the revisions, General Motors again reminded Folsom Chevrolet of its
17 opportunity to provide information to GM pursuant to Article 4.2 of the Dealer Agreement. (*Id.* at
18 GM000002941) Folsom Chevrolet did not provide any additional information in response. (RT Vol.
19 8, 189:3-16 (M. Crossan).) Then, on September 16, 2013, General Motors notified Folsom Chevrolet
20 that it had finalized its AGSSA assignment. (R209 (Sept. 16, 2013 Final Decision of APR and
21 AGSSA).) The first words on the notice sent to Folsom Chevrolet again stated, in bold font, that it
22 had the right to file a protest. (*Id.*) However, despite its earlier threat that it would file a Protest with
23 the New Motor Vehicle Board if GM attempted to "revise our APR and AGSSA as proposed."
24 (R281 at 3), Folsom Chevrolet did not file a protest in response to the changes in its AGSSA. (RT
25 Vol. 8, 189:17-190:2 (M. Crossan).)

26 244. Finally, in July 2015, during the cure period, Mr. Crossan wrote another letter
27 regarding his territory, in which he referenced the concerns he made in his April 2013 letter, and
28 stated that "the recent expansion of our APR and AGSSA" had increased its sales expectations to

1 unsustainable levels. (R226 (July 14, 2015 Ltr.)) However, it had been nearly four years since that
2 territory was first assigned to Folsom Chevrolet, and nearly two years after GM's September 2013
3 modification to its AGSSA. (RT Vol. 8, 190:10-191:5 (M. Crossan).) It was also nearly two years
4 after the final notice of revisions made in 2013. (RT Vol. 8, 190:10-16 (M. Crossan).) General
5 Motors nonetheless reviewed the dealership's territory once again, and confirmed it was correctly
6 configured. (R230 (Aug. 21, 2015 Ltr.))

7 245. Thus, at no point since 2009 has Folsom Chevrolet provided timely or accurate
8 feedback to General Motors regarding the configuration of its AGSSA. Even today, Folsom
9 Chevrolet seems to have a limited understanding of its own AGSSA, as neither Marshal nor Larry
10 Crossan knew that Folsom Chevrolet's territory does not cover the town of Jackson. (RT Vol. 8,
11 84:25-85:4 (L. Crossan); (RT Vol. 8, 164:21-165:3 (M. Crossan).)

12 **3. Folsom Chevrolet's AGSSA is not Unreasonably or Unusually Large**

13 246. Folsom Chevrolet's objections at the hearing often focused on the size of the
14 purportedly unreasonable size of its AGSSA, but evidence showed that its assignment is not
15 unreasonably large.

16 247. As an initial matter, geographic size is extremely misleading when it comes to census
17 tracts. Each tract contains about 4,000 people, which means that it is the number of tracts, not their
18 physical size, which truly matters. (RT Vol. 5, 30:16-31:25 (Farhat).) Larger census tracts simply
19 mean that the population density is low in those areas. (*Id.*)

20 248. Second, as seen in Exhibit R290, Folsom Chevrolet's AGSSA—shaded in yellow—is
21 not especially large in comparison to other dealers. The dealerships in Jamestown, California and
22 Carson City, Nevada both have AGSSAs that are far larger than that assigned to Folsom Chevrolet.
23 (R290.001.) Indeed, there are single census tracts along the Nevada border that are as large or larger
24 than the entire Folsom AGSSA. (*Id.*) But those tracts are likely to be largely unpopulated, just as
25 Folsom Chevrolet's eastern tracts are largely unpopulated, and so they contribute little to any
26 dealer's sales expectations. In fact, a map showing registrations in the Sacramento APR
27 demonstrates that the two large tracts in Folsom Chevrolet's AGSSA farthest to the east appear to
28 have fewer than 100 total vehicle registrations, combined, per year. (*See* R244.073.)

1 249. Third, Folsom Chevrolet's total sales expectations are very much in line with the
2 other Sacramento dealers. For example, in 2016, Folsom Chevrolet was expected to sell 1,324
3 vehicles, while John L. Sullivan was expected to sell 1,396, Kuni 1,355, and Maita 1,182. (*See*
4 R246.015.) Thus, while Folsom Chevrolet's AGSSA may physically be larger than, say, Kuni's
5 AGSSA (R244.024), each is expected to achieve approximately the same number of sales.

6 250. Fourth, evidence established that Chevrolet offers nearly identical convenience in the
7 Folsom AGSSA—that is, drive distance to the nearest dealership from each population centroid—as
8 do Subaru, Ford, Kia, Nissan, Volkswagen, and Hyundai. (RT Vol. 5, 73:16-76:1 (Farhat).) Indeed,
9 Ford, the primary competitor for Chevrolet, has configured its dealer network in this area in almost
10 exactly the same fashion as Chevrolet. (RT Vol. 5, 73:16-75:12, 156:16-157:2 (Farhat).)

11 251. Fifth, when Mr. Crossan was asked at his deposition which tracts in his AGSSA
12 should *not* be assigned to Folsom Chevrolet, he could not identify a single one. (RT Vol. 8, 190:3-8
13 (M. Crossan).)

14 4. Evidence Established that Folsom's AGSSA is Reasonably Constructed

15 252. In addition to the fact that Folsom Chevrolet's AGSSA is not unreasonably large, and
16 largely similar to that of its competitors, testimony at the hearing showed that the AGSSA accurately
17 captures the shopping patterns of residents in the area, particularly the fact that customers to the east
18 along Highway 50 shop and travel through Folsom.

19 253. Mr. Joe Gagliardi lived for 25 years in El Dorado Hills, which is just east of Folsom
20 on Highway 50. (RT Vol. 8, 24:5-10 (Gagliardi).) He testified that going east from El Dorado Hills,
21 the next towns are Cameron Park, Shingle Springs, and then Placerville. (RT Vol. 8, 24:18-21
22 (Gagliardi).) Mr. Gagliardi testified that in his experience, a majority of residents in El Dorado Hills
23 do their shopping in Folsom. (RT Vol. 8, 24:11-17 (Gagliardi).) Under impeachment with his
24 deposition testimony, he also admitted that a lot of residents in the towns east of Folsom work in
25 Sacramento, and therefore drive through Folsom daily. (RT Vol. 8, 25:3-25 (Gagliardi).)
26 Furthermore, there is limited retail in El Dorado Hills and Cameron Park, and very little in Shingle
27 Springs. (RT Vol. 8, 26:1-11 (Gagliardi).) As a result, many Folsom merchants advertise into the
28

1 markets going east, including into Shingle Springs and Placerville. (RT Vol. 8, 26:12-22
2 (Gagliardi).)

3 254. Drew Crossan testified that the dealership markets to the area going east towards
4 Tahoe, because “the cities on that 50 corridor, like Placerville,” as well as Shingle Springs, “buy cars
5 from” Folsom Chevrolet. (RT Vol. 9, 160:10-17 (D. Crossan).) This testimony was backed up by
6 winner map data provided by Mr. Farhat, which shows that from 2013 to 2015, Folsom Chevrolet
7 was the primary seller of vehicles into nearly every census tract within its AGSSA. (R244.055.) This
8 data “confirms that the area east comes down to the Folsom area to purchase. They’re not going
9 south or going further east. They’re really coming down to Folsom to purchase their vehicles.” (RT
10 Vol. 5, 69:20-71:14 (Farhat).)

11 255. Larry Crossan testified that Shingle Springs is just 10-12 minutes from Folsom up
12 Highway 50. (RT Vol. 8, 80:17-19 (L. Crossan).) He agreed that a “large majority” of Shingle
13 Springs residents “work in Sacramento,” and therefore “drive by the Folsom Auto Mall” on their
14 way to work. (RT Vol. 8, 80:20-81:3 (L. Crossan).) In fact, Larry Crossan ascribed the failures of
15 both the former Ford dealership in Placerville and his former Dodge store in Shingle Springs to the
16 fact that neither location could compete with the Folsom Auto Mall. (*See* RT Vol. 8, 79:16-80:16,
17 94:13-95:6 (L. Crossan).) Ford and Dodge are the “prime competitors to Folsom Chevrolet.” (RT
18 Vol. 8, 94:13-15 (L. Crossan).)

19 256. Indeed, Folsom Chevrolet may have had a similar effect on the former Chevrolet
20 dealers in both Shingle Springs and Jackson. Mr. Crossan agreed that, prior to 2009, Folsom
21 Chevrolet sold “a lot of vehicles” into Shingle Springs, even when the dealership there was open.
22 (RT Vol. 8, 165:4-13 (M. Crossan).) Buyer behavior reports adduced at the hearing demonstrated
23 this effect was quite large; in 2007, for example, the Shingle Springs dealer sold 124 vehicles into its
24 own AGSSA, but Folsom Chevrolet actually sold 144 vehicles there, outselling the native dealer.
25 (R288.001.) In Jackson, meanwhile, the local dealer sold 77 vehicles into its own AGSSA, while
26 Folsom Chevrolet sold 24 units there. (*Id.*)

27 **5. Folsom Chevrolet Receives the Benefits of Both Rural and Urban**
28 **Markets**

1 257. Mr. Stockton, Folsom Chevrolet's expert, opined that rural areas tend to have less
2 cross-sell between markets than urban areas do. (RT Vol. 7, 42:9-14 (Stockton).) Put another way, in
3 an urban AGSSA with many options, a dealer will both lose and gain more customers to competing
4 dealers, while in a rural AGSSA with fewer options, there is a greater likelihood that any individual
5 dealer will be able to capture the sales within that AGSSA because the alternatives are so far away.
6 (*Id.*)

7 258. As it turns out, because it sits on the edge of the Sacramento metro, Folsom Chevrolet
8 is ideally positioned to take advantage of both effects. As can be seen in Mr. Farhat's report, the
9 dealership sells to customers throughout the Sacramento metro area, who are naturally more
10 susceptible to cross-sell due to the nature of the urban area. (*See* R244.077 (showing Folsom
11 Chevrolet's retail sales in the Sacramento APR).) However, as described above, it is also positioned
12 to capture sales from customers driving along Highway 50, which runs directly past the Folsom Auto
13 Mall. (RT Vol. 8, 80:20-81:3 (L. Crossan).) This can be seen in Mr. Farhat's report as well, as the
14 dealership makes sales in a broad band stretching east towards Placerville. (R244.077.) Thus, it
15 appears that Folsom Chevrolet's location is ideally positioned to capture both cross-sales from the
16 Sacramento metro area and sales from its more-rural AGSSA.

17 C. **General Motors' Business Decision to Preference Retail Sales by Dealerships**
18 **Over Fleet Sales is Reasonable**

19 259. Folsom Chevrolet has suggested that it should make little difference whether it sells
20 to a retail customer or a fleet customer: "the differentiation of whether it's a retail unit. . . or the, you
21 know, commercial -- commercial fleet units that we were doing, or our regular big fleet account, it's
22 all Chevrolet." (RT Vol. 8, 193:16-25 (M. Crossan).) But Folsom Chevrolet's suggestion ignores
23 some serious business realities, first and foremost of which is that General Motors has made a
24 business decision to focus on *retail* customers, not fleet customers. The evidence at the hearing
25 established that this decision is reasonable, and it is written into the very Dealer Agreement Folsom
26 Chevrolet signed.

27 1. **General Motors' Business Model Focuses on Retail Sales**
28

1 260. The discussion starts with the context that General Motors is a very large and very
2 complex organization. The manufacturing challenges required to meet its sales needs are immense;
3 just part of Mr. Muiter's role, for example, is to "do model option forecasting, where we're
4 forecasting *40 weeks out* the component penetration, so the orders and the material, which goes to
5 our tier 1 suppliers." (RT Vol. 3, 7:9-25 (Muiters) (emphasis added).) His group then "schedule[s] in
6 sequence the orders to all of the plants here in North America, including select plan[t]s overseas,
7 Korea, China, Europe." (*Id.*)

8 261. Consequently, there are many aspects of General Motors' operations that are not
9 easily changed. Fundamental among these is that the company's business model focuses on retail
10 sales from its retail dealers. Mr. Muiter described the company's approach as follows:

11 [A]s I look across the organization from a resource perspective,
12 engineering resources, material resources, people resources, and the
13 competitive challenges, it's primarily on the retail side. Again, 80
14 percent of the industry is made up of retail sales. Those are individual
15 sales to consumers with the other 20 percent dedicated to fleet sales.

16 (RT Vol. 3, 8:24-9:8 (Muiters).) This is not an arbitrary or trivial choice: "When I take a look at our
17 manufacturing schedule, we dedicate about 20 percent of our schedule to fleet, and that's a
18 negotiated number internally, and there's a lot of reasons for that." (RT Vol. 3, 82:17-83:5 (Muiters).)

19 262. General Motors has put extraordinary resources into developing a brand that serves its
20 business model of making retail sales. "[A] retail customer is one on at a time," and so "both GM
21 and the dealer try to create an image in the community with that retail customer both on the brand
22 awareness, the quality of the product, the availability of the product through advertising both media,
23 digital," all just to "create an awareness where you're part of the consumers' consideration when
24 they're deciding to make a purchase." (RT Vol. 3, 9:21-10:5 (Muiters).)

25 263. General Motors has also put extraordinary resources into developing its dealership
26 network—again, to make retail sales. Retail sales are highly proximity-sensitive, so its dealers must
27 be "located in a location that's convenient for the customer. . . . You want to have it where it's good
28 visibility, accessible to the customer, so that they can attract that retail customer." (RT Vol. 3, 9:9-20
(Muiters).) GM does everything it can to increase that convenience; there are 3,000 dealers for
Chevrolet in the United States alone. (RT Vol. 3, 133:10-13 (Giguere).) Indeed, its entire method of

1 assigning territory is fundamentally based on convenience and geographical proximity, subdividing
2 the entire country by census tracts based on metrics like drive time and drive distance. (RT Vol. 3,
3 210:7-18 (Giguere).)

4 264. By contrast, fleet sales are not location sensitive. "You can pretty much sell fleet
5 business from anywhere." (RT Vol. 3, 9:9-20 (Muter).) As Mr. Farhat testified:

6 In my experience, a fleet operation is much different than a retail
7 operation. You see dealer locations and facilities, and so forth, that
8 aren't -- typically, the bigger fleet dealers aren't oriented towards
9 retail. They don't necessarily focus on a nice showroom. They could
be a little shack in the middle of Connecticut that, you know, didn't
cost much to operate.

10 It's just a different type of operation. I'm not saying they're exclusive,
11 but it's not the same business model.

12 The retail customer wants to be treated a certain way. They want to
13 have certain hours of operation, to be able to contact the dealership in
14 certain ways. All of those things are focused on retail. And that's the
issue, in my opinion, at hand. Fleet sales are a different animal and
should not be compared in the same way.

15 (RT Vol. 5, 90:21-91:18 (Farhat).)

16 265. Folsom Chevrolet's own sales bear this out. Mr. Farhat's analysis found that 74.9% of
17 its retail sales were made into its APR (the Sacramento metro area) from 2013-June 2016, while only
18 15.1% of its fleet sales were made in that area. (R246.022.) Similarly, Mr. Muter analyzed Folsom
19 Chevrolet's fleet sales in 2017, and found that of about 493 units sold fleet, only 39 percent were
20 even reported as sold to addresses in California. (RT Vol. 3, 10:6-25 (Muter).) Of those vehicles
21 sold in California, the addresses reported were "as high north as Chico, as far south as Anaheim."
22 (*Id.*)

23 266. This data was backed up by testimony from Folsom Chevrolet witnesses. For
24 example, Mr. Crossan testified that the large Solar City fleet sale made in 2015 went primarily to
25 "Southern California and the Bay Area." (RT Vol. 6, 253:25-255:2 (M. Crossan).) And Mr.
26 Schoonbrood testified that he makes a lot of sales "to the Bay Area or between here and the Bay
27 Area. . . . I've got them down to LA sometimes. Every once in a while, I'll get something going out
28 of state." (RT Vol. 9, 191:12-22 (Schoonbrood).)

1 267. All of which is to say that GM dealership locations like Folsom Chevrolet exist to
2 make local retail sales, not fleet sales. “You don’t need a dealer in Folsom, California to sell to fleet
3 customers in Anaheim, California. You can put that dealer anywhere. We do need a dealer in
4 Folsom, California to address the retail market.” (RT Vol. 3, 11:3-10 (Muiters).)

5 268. For this reason, the Dealer Agreement focuses on retail sales by the dealer alone. (RT
6 Vol. 2, 458:25-459:16 (Giguere); *see also* RT Vol. 4, 72:4-10 (Meier) (the “essence of th[e]
7 agreement is a retail agreement”).) It sets forth a method for measuring sales performance, RSI,
8 which is explicitly focused on retail sales. (R201.009 § 5.1.1(f) (“Dealer agrees to . . . comply with
9 the retail sales standards established by General Motors”).) This is the Dealer Agreement that
10 Folsom Chevrolet signed, and it is the measurement that Folsom Chevrolet agreed to.

11 **2. Folsom Chevrolet’s Alternative Business Model was Knowingly**
12 **Antithetical to a Retail Operation**

13 269. Despite all of the above, Folsom Chevrolet has decided to use much of its inventory
14 in order to facilitate large numbers of fleet sales, to the detriment of its retail business. (*See supra*, §
15 III(A).) Undoubtedly, Folsom Chevrolet has been successful in facilitating those fleet sales. But in
16 doing so, it was knowingly operating outside of the structure of GM’s business model and the
17 requirements of the Dealer Agreement. It was also knowingly crippling its ability to make retail
18 sales. (*Id.*; R226.002 (“our large number of fleet sales diminishes our inventory levels and adversely
19 impacts our ability to make additional retail sales”).)

20 270. One of the most startling pieces of information provided at the hearing was Mr.
21 Schoonbrood’s admission that the large fleet companies he sells to have no need to make regular
22 fleet orders through Folsom Chevrolet, because “they have their own dealerships.” (RT Vol. 9,
23 190:9-19 (Schoonbrood).) He continued: “If they had the time or the customer had the time to wait
24 for a factory order, they would do that through their own company, through their own dealership.”
25 (*Id.*) “The ones I usually do are vehicles that are immediate need for that particular company. So
26 they’ll call me and say we need some help, we need some vehicles, and I do my best to make it
27 happen.” (RT Vol. 9, 190:20-191:11 (Schoonbrood).)

1 271. The implications of this admission are remarkable. These leasing companies own
2 their own dealerships—plural—because it saves them a little bit of money on each sale. They can
3 presumably operate those dealerships for any purpose permissible under their own dealer
4 agreements. Yet rather than build out and take from the inventories of these dealerships—again,
5 plural—to accommodate their “immediate need” for vehicles, they choose to purchase vehicles out
6 of Folsom Chevrolet’s inventory, not their own. And Mr. Schoonbrood has multiple such leasing
7 companies as clients, meaning Folsom Chevrolet’s inventory is being farmed out to an almost
8 unfathomable degree, all at the expense of its retail operations.

9 **D. General Motors’ use of RSI to Measure Dealership Sales Performance is**
10 **Reasonable**

11 **1. General Motors has a Reasonable Interest in Measuring the Performance**
12 **of its Dealers**

13 272. Every business must have a process to measure performance, and General Motors is
14 no different. Even Mr. Stockton admitted that GM has a reasonable interest in monitoring the sales
15 outcomes of its dealerships. (RT Vol. 7, 153:13-16 (Stockton).) In fact, for a manufacturer like GM,
16 “dealers are their customers.” (RT Vol. 7, 133:4-7 (Stockton).) Mr. Stockton conceded that it is
17 therefore reasonable for GM to use “a quick, simple, and replicable way to see which dealerships are
18 producing more or less.” (RT Vol. 7, 140:8-11 (Stockton).)

19 273. Indeed, evidence established that Folsom Chevrolet itself had processes to hold
20 employees accountable to their duties and performance, including setting sales objectives for its
21 salespeople based upon the objectives provided by General Motors. If those sales objectives were
22 not met, Folsom Chevrolet management would first sit down with that salesperson and go over what
23 “he’s going to do to get to his objective.” (RT Vol. 8, 67:12-18 (L. Crossan).) Possible interventions
24 might include “some training to maybe give them a little more success.” (RT Vol. 8, 66:16-67:11 (L.
25 Crossan).) And if a salesperson still refused or failed to meet their objective after that, “they’d be
26 terminated.” (RT Vol. 8, 67:19-21 (L. Crossan).) “[A]t that point, you didn’t feel like there was
27 anything else that could be done.” (RT Vol. 8, 93:25-94:6 (L. Crossan).)

1 274. Here, General Motors has set clear sales objectives and measured Folsom Chevrolet
2 against them, just as Folsom Chevrolet does for its own salespeople. The fact that Folsom Chevrolet
3 has measured up poorly against those objectives does not invalidate the metric itself. In fact, Mr.
4 Stockton testified that RSI serves as a “good first step” in the analysis of a dealership. (RT Vol. 7,
5 139:23-24 (Stockton).) He analogized it to a weathervane, which in this case shows that Folsom
6 Chevrolet “is buying fewer cars that end up at retail than the average dealer.” (RT Vol. 7, 140:1-17
7 (Stockton).) For this reason, he “understand[s] what GM is seeing” and “understand[s] that GM
8 might ask questions” of the dealership. (RT Vol. 7, 140:20-23 (Stockton).)

9 **2. RSI and Equivalent Metrics have been Used by the Auto Industry for**
10 **Decades**

11 275. GM has been utilizing RSI since the late 1970s. (RT Vol. 2, 461:17-22 (Giguere).)
12 And although it goes by other names at other companies, General Motors’ measure of evaluating
13 dealer sales performance is “the same process . . . throughout the automotive industry.” (RT Vol. 5,
14 20:15-16 (Farhat).) For example, Chrysler calls its performance metric Minimum Sales
15 Responsibility or MSR, but the metric is similar to RSI. (RT Vol. 10, 8:2-12 (Kaestner).)

16 276. Mr. Farhat testified that in the automobile industry, “[t]he concept of sales over
17 expectation is fundamental.” (See RT Vol. 5, 20:11-21 (Farhat).) According to Mr. Farhat, “[i]t’s
18 been in the automotive analysis process since I’ve been involved and long before, and it’s the same
19 process performed, again, by General Motors and Ford and Toyota, Nissan, Honda.” (*Id.*)

20 **3. The RSI Calculation⁶ is Transparent, Conservative, and Objective**

21 277. One of the benefits of the auto industry is that it has very detailed, objective data
22 available for use. There is thus no sampling or estimation required in calculating; the registration
23 data is complete, because every vehicle that is driven needs to be registered with the DMV. (RT Vol.
24 5, 15:17-16:7 (Farhat).) Furthermore, because it is calculated retrospectively, it does not require
25

26 ⁶ The RSI calculation was covered in great detail at the hearing, and there has been no
27 substantive challenge to the method of calculating the metric (as opposed to its meaning), so GM
28 will not rehash the calculation itself here. If needed, however, a full explanation may be found in Mr.
Giguere’s testimony. (See RT Vol. 2, 465:21-473:6 (Giguere).)

1 projection or estimation of any kind; it is entirely based on actual, objective data. (*See, e.g.*, RT Vol.
2 5, 113:24-114:16 (Farhat).)

3 278. Another benefit of RSI is that the calculation is provided transparently, and in great
4 detail, in quarterly Sales Performance Reviews provided by GM to dealers. (RT Vol. 1, 66:21-67:14
5 (Stinson).) As Mr. Stinson noted, this is “a dealer’s report card . . . it really gets into every vehicle
6 line.” (*Id.*) Finally, RSI is inherently a conservative measure, because it credits dealers with sales
7 regardless of whether they are made within its AGSSA or APR. (RT Vol. 2, 473:11-23 (Giguere).)

8 4. RSI Takes into Account Local Conditions and Consumer Preferences

9 279. RSI takes into account local conditions and consumer preferences in several ways.
10 Most notably, because it uses actual registration data, it automatically accounts for economic factors
11 like downturns—if nobody in an area purchases a vehicle, expected sales would be zero. (RT Vol. 2,
12 475:13-476:2 (Giguere).) The segmentation process also takes into account both local conditions and
13 consumer preferences, because it adjusts expectations based on the types of vehicles being sold in
14 that market. (*Id.*) This also indirectly adjusts for economic factors and household income, because
15 segments like luxury cars move in tandem with the strength of the economy. (RT Vol. 3, 196:7-
16 197:11 (Giguere).)

17 280. The use of state average market share also takes into account both local conditions
18 and consumer preferences. For example, the Chevy Malibu is much more popular nationwide than it
19 is in California, but Folsom Chevrolet is only held to the level of popularity the car achieves in the
20 state. (RT Vol. 5, 48:11-49:17 (Farhat).) On the other hand, because the Silverado 1500 crew cab is
21 particularly popular in California, Folsom Chevrolet is expected to sell more of them than a dealer in
22 another state might be. (RT Vol. 5, 50:25-51:15 (Farhat).) Unfortunately for Folsom Chevrolet, it
23 does a very poor job of selling that vehicle. (*Id.*)

24 281. To the extent that consumer preferences or local conditions change, that will be
25 adjusted for in RSI, because the calculation is based on the actual registrations that occurred during
26 the time frame at issue. (RT Vol. 5, 53:8-23 (Farhat).) Thus, if another brand of vehicle were to
27 suddenly become popular, RSI automatically adjusts for that. (*Id.*)

1 282. A final way that RSI takes into account local conditions is through the use of
2 rankings. In the Sales Performance Reviews, GM provides not just an RSI score, but also a ranking,
3 such as 124 out of 128. (*See, e.g.*, R242C.002 (2014 Sales Performance Review).) To the extent that
4 local conditions are a concern, the rank of the other local dealerships would be affected as well.
5 Thus, if all Sacramento dealers were near the bottom of the RSI rankings, that would be cause for
6 concern. (RT Vol. 10, 89:11-90:20 (Farhat).) However, because the other Sacramento dealers
7 generally perform well, it indicates that there are no local conditions unduly weighing down
8 Sacramento sales. (*Id.*)

9 **5. The Use of Expected Sales is Reasonable**

10 283. The fundamental premise of RSI, and the reason it is used over something like raw
11 sales, is that dealers in larger markets have more opportunity to sell than dealers in smaller markets.
12 (RT Vol. 5, 20:22-21:18 (Farhat).) For this reason, it is unfair to treat all dealers as though they had
13 an equal opportunity to make a particular number of sales. (RT Vol. 5, 22:11-22 (Farhat).)

14 284. Mr. Farhat's analysis shows that this premise holds true. California dealers' retail
15 sales correlate to their expected sales with an R^2 value of .5363, meaning that the measured
16 opportunity alone accounts for just over half of the variance seen in dealership sales. (R244.022; RT
17 Vol. 5, 23:12-26:16 (Farhat).) Furthermore, Mr. Farhat testified that he's "done this test hundreds of
18 times," and it holds up all over the world: "This relationship holds for Porsche dealers in the United
19 States. It holds for Mercedes dealers in Germany. It's a fundamental premise that large markets offer
20 more opportunity, and those dealers sell more." (*Id.*)

21 **6. Folsom Chevrolet's Expected Sales are Reasonable**

22 285. Putting aside the question of sales expectations in general, Folsom Chevrolet has
23 described its sales expectations in particular as unreasonable. (*See* R226.001.) However, evidence
24 shows that this is simply not the case.

25 286. As an initial matter, Folsom Chevrolet generally faces favorable conditions in terms
26 of demographics, economic conditions, and location. (RT Vol. 5, 116:18-117:5 (Farhat).) It is well-
27 located and visible in a strong auto mall (RT Vol. 5, 37:21-38:6 (Farhat)), and its location is
28 particularly well-suited to pick up sales from customers located to its east, as described above. In the

1 early 2000s, operating from the same location, the dealership routinely sold more than a thousand
2 pickup trucks alone each year. (RT Vol. 8, 224:14-225:6 (M. Crossan).) Put another way, if the
3 dealership sold the same number of vehicles in 2016 as it did in 2003, it would have met its expected
4 sales requirements. (RT Vol. 2, 479:17-22 (Giguere).)

5 287. If anything, the conditions should be more favorable to Folsom Chevrolet now than in
6 2003. SAAR, a measure of the auto industry's sales as a whole, has been going up for almost a
7 decade, and is now at the highest level it has ever been. (RT Vol. 6, 71:6-25 (Woodward).) Chevrolet
8 specifically has been successful over the last few years; in fact, it has increased its retail market
9 share in Northern California and nationally for the last three years. (RT Vol. 1, 120:14-121:6
10 (Stinson); Vol. 8, 218:19-25 (M. Crossan).) Meanwhile, the population of Folsom grew 39% just
11 from 2000 to 2010. (RT Vol. 8, 27:15-18 (Gagliardi).) The average household income is over
12 \$100,000, which is higher than state average. (RT Vol. 8, 27:25-28:4 (Gagliardi).) And new
13 businesses continues to relocate to the area, including tech companies. (RT Vol. 8, 28:17-29:6
14 (Gagliardi).)

15 288. Certainly, Folsom Chevrolet's neighbors in the auto mall are successful. Evidence
16 showed that in 2013, Ford made over 1600 retail sales while Chrysler made 1200. (R210; RT Vol. 1,
17 118:25-119:5 (Stinson).) Folsom Chevrolet, meanwhile, made just 370 retail sales against an
18 expectation of 904. (R242B.002 (2013 Sales Performance Review).) The Ford store is therefore able
19 to meet sales expectations with an extremely similar dealer network configuration, even as Folsom
20 Chevrolet struggles to meet 60 RSI. (R244.058.)

21 289. As described above, Folsom Chevrolet's sales expectations are also quite similar to
22 those of the other Sacramento dealerships. For example, in 2016, Folsom Chevrolet was expected to
23 sell 1,324 vehicles, while John L. Sullivan was expected to sell 1,396, Kuni 1,355, and Maita 1,182.
24 (See R246.015.) These other dealers are nonetheless sales effective, performing at an average of 97.1
25 RSI. (R244.036.)

26 290. As a result, the idea that Folsom Chevrolet cannot meet GM's sales expectations is
27 just not credible. Consider the testimony of Mr. Kaestner, most recently the general manager of
28 Folsom Lake Dodge in the Folsom Auto Mall. (RT Vol. 9, 223:4-15 (Kaestner).) He stated that he's

1 “used to doing 200 to 250 cars a month.” (RT Vol. 9, 246:23-247:14 (Kaestner).) He’d like to sell
2 close to 2,000 cars per year. (RT Vol. 9, 244:4-17 (Kaestner).)

3 291. To Mr. Kaestner, “to do a hundred cars a month or to do 125 or 150 cars a month, it’s
4 like watching paint dry.” (RT Vol. 9, 246:23-247:14 (Kaestner).) Yet Mr. Kaestner also asserted that
5 GM’s goal of 109 new vehicles for the month was “a far reach,” and implied it was an unfair goal.
6 (RT Vol. 9, 245:3-21 (Kaestner).) This conflicting testimony, in contrast with Mr. Kaestner’s real-
7 world results at other dealerships, was not credible.

8 **7. The Experiences of Other California Dealerships Confirms that Folsom**
9 **Chevrolet can Meet its Sales Goals**

10 292. Evidence at the hearing established that Folsom Chevrolet was far from the only
11 dealership to see its territory increase following bankruptcy. Exhibit R289 shows 6 dealers in Mr.
12 Stinson’s Northern California zone that had a large increase in expected sales between 2010 and
13 2011, and then again from 2011 to 2016, but were able to increase their sales to compensate. (R289.)
14 The increases from 2010 were due, like Folsom Chevrolet, to the addition of territory following the
15 closure of other dealers around the time of bankruptcy. (RT Vol. 10, 31:18-32:4 (Stinson).)

16 293. Of these six dealers, the closest comparison may be Capitol Chevrolet, which saw a
17 250% increase in its expected sales from 2010 to 2011 due to the closure of two nearby dealers.
18 (R289; RT Vol. 10, 33:10-21 (Stinson).) Folsom Chevrolet, meanwhile, saw a 221% increase. (RT
19 Vol. 10, 40:2-12 (Stinson).) Unlike Folsom Chevrolet, however, Capitol went through a buy-sell in
20 2011, which brought about a change in operations that allowed it to significantly increase its sales.
21 (RT Vol. 10, 34:14-35:2 (Stinson).) It then kept pace as growing market share and auto registrations
22 caused it sales expectations to increase over time, with sales growing from 59 in 2010 (14.7 RSI) to
23 997 in 2011 (99 RSI) to 2,465 in 2016 (107.5 RSI). (R289.)

24 294. In addition, Mr. Farhat discussed the Boardwalk dealership, which also appears on
25 R289 as an example of a dealer which saw an increase in expected sales due to the loss of nearby
26 dealers. Even when measuring its performance solely against its present AGSSA, Mr. Farhat found
27 the dealership was able to achieve large performance gains in just a short time, nearly doubling its
28 RSI score from 2011 to 2012. (RT Vol. 5, 128:25-130:20 (Farhat); R244.086.)

1 295. Mr. Farhat also provided examples of other dealers that were able to improve sales
2 simply by changing operations. Graham Chevrolet in Santa Barbara, California, underwent a change
3 in management, but stayed in the same location and facility as before. (RT Vol. 5, 127:6-128:23
4 (Farhat).) Merely by changing ownership, it was able to increase its RSI from 52 to 105 in a short
5 period of time. (*Id.*; R244.083.) Another dealer, in Hemet, California, was able to achieve similar
6 improvement by relocating to a newer facility. (RT Vol. 5, 127:6-128:23 (Farhat); R244.084.)

7 296. The final example of a dealer that was able to increase its sales due to operational
8 changes is Woodland Chevrolet. (*See* R246.013.) Woodland, which happens to be in Mr. Stockton's
9 "5 County Area," relocated twice within a short span of time. (*Id.*; 107:22-108:18 (Farhat).) Despite
10 having a below-average RSI in 2013, the dealership's change in location and operations were
11 effective, and as of 2016, it was achieving a strong 142 RSI. (R244.085.)

12 8. Folsom Chevrolet's RSI Ranking is Confirmed by Other Metrics

13 297. Between Mr. Farhat and Mr. Stockton, the parties presented the results of numerous
14 other analyses of Folsom Chevrolet's sales performance. While the specific numeric values
15 associated with these analyses depend upon the benchmark at issue, the common finding was that
16 Folsom Chevrolet always comes in last (or near-last) of whatever comparison group was used—
17 typically, Sacramento dealerships. (RT Vol. 10, 62:24-63:25 (Farhat).)

18 298. Thus, Folsom Chevrolet ranks last among the five Sacramento dealers using the
19 normal RSI calculation. (R244.036.) But it continues to rank last in the comparison group of 5
20 Sacramento dealers when the average market share data benchmark is changed from the State of
21 California as a whole to a smaller area, such as Northern California (R244.060), the Sacramento
22 DMA (R244.061), or Sacramento alone (R244.0062.) The numbers may change on an absolute
23 basis, particularly if using Sacramento alone, because that market share data is heavily affected by
24 Folsom Chevrolet's poor retail sales performance; Mr. Farhat referred to this as "a problem of
25 measuring yourself against yourself." (RT Vol. 5, 81:17-82:12 (Farhat).) However, that does not
26 change the conclusion that Folsom Chevrolet is last among the comparison group. (*Id.*)

27 299. Mr. Farhat then considered two of the benchmarks suggested by Mr. Stockton: the
28 arbitrary "5 County Area," and Mr. Stockton's demographic "model." (R246.014-15.) Even using

1 Mr. Stockton's own model, however, Folsom Chevrolet still comes in last among the 5 Sacramento
2 dealerships. (*Id.*; RT Vol. 5, 85:14-86:5, 112:2-113:23 (Farhat).) In other words, even when utilizing
3 suggested adjustments that took literally hundreds of hours to create (*see infra*), from a firm that has
4 "been working on this issue for decades," the analysis still confirms that Folsom Chevrolet is the
5 least effective dealer in the Sacramento market. (RT Vol. 10, 62:24-63:25 (Farhat).)

6 300. The dealership's poor sales effectiveness was also measured by another metric which
7 sidesteps the issue of AGSSA completely. Mr. Farhat prepared an analysis which looks solely to
8 sales effectiveness within 2-mile "rings" around the dealership, irrespective of who the territory is
9 assigned to. (*See* R244.078.) He found that Folsom Chevrolet captures sales at a far lower rate than
10 the other Sacramento dealers at every range, but particularly in the closest "rings." (*Id.*; RT Vol. 5
11 118:4-120:6 (Farhat).) Folsom Chevrolet's poor performance in this metric cannot be attributed to its
12 AGSSA, nor can it be attributed to local conditions, because it was measured solely against other
13 Sacramento dealers. (*Id.*) As a result, this analysis confirms that RSI has correctly identified Folsom
14 Chevrolet as a poor sales performer.

15 9. Folsom Chevrolet's RSI is Confirmed by GM's Extensive Counseling

16 301. The final confirmation of Folsom Chevrolet's poor RSI scores was performed by
17 General Motors itself, in the form of years of counseling and efforts to assist the dealership. GM's
18 efforts to assist, described above, included quarterly meetings with Mr. Stinson; 200+ visits from
19 Mr. Escalante over four years; free consultations with Maritz representatives; the in-depth POP
20 meeting that kicked off the performance improvement program; repeated AGSSA configuration
21 reviews; STMI and supplemental allocation of vehicles; and more.

22 302. In short, all evidence showed that General Motors used the dealership's low RSI not
23 as the sole indicator of underperformance, but as the "weathervane" and "good first step" Mr.
24 Stockton suggested the metric was appropriate for. (RT Vol. 7, 139:23-140:17 (Stockton).) This is
25 consistent with Mr. Farhat's understanding of how GM uses RSI. (RT Vol. 5, 26:17-29:2 (Farhat).)
26 But after years of such efforts, General Motors' belief that Folsom Chevrolet's sales performance
27 was unacceptably low and in breach of the Dealer Agreement, due to the dealership's own
28 operations decisions, remained unchanged. Thus, General Motors' extensive efforts to counsel and

1 assist Folsom Chevrolet, and subsequent finding that it is indeed underperforming, confirm the
2 reasonableness of RSI.

3 **10. Mr. Stockton Failed to Show That Folsom Chevrolet is Actually Sales**
4 **Effective**

5 303. At the hearing, Mr. Stockton leveled a number of criticisms at General Motors, RSI,
6 and Mr. Farhat, and put forward several analyses of Folsom Chevrolet's sales performance.
7 However, these criticisms lack validity, and Mr. Stockton's analyses fail to show that Folsom
8 Chevrolet has met its sales performance obligations under the Dealer Agreement.

9 a. GM Used RSI as the "Weathervane" Mr. Stockton Suggests

10 304. As described above, GM did in fact use RSI not as the sole indicator of
11 underperformance, but as the "weathervane" and "good first step" Mr. Stockton suggested the metric
12 was appropriate for. (RT Vol. 7, 139:23-140:17 (Stockton).) But despite asserting that RSI could be
13 used as a "weathervane" in this manner, he demonstrated at the hearing that he has no understanding
14 of GM's actual counseling processes in this case.

15 305. Specifically, Mr. Stockton testified he was not aware of the counseling provided by
16 GM to Folsom Chevrolet over a number of years; at the time of his deposition, he was not aware the
17 dealership had received supplemental allocation; he was not aware that Folsom Chevrolet received
18 free counseling from Maritz; he was not aware that Mr. Escalante called upon Folsom Chevrolet
19 personally over 200 times; and he was not even aware that GM representatives held quarterly
20 meetings with Folsom Chevrolet in an effort to assist. (RT Vol. 7, 141:18-142:18 (Stockton).) Thus,
21 at the hearing, Mr. Stockton conceded that these efforts could in fact represent "an attempt by the
22 manufacturer to use RSI not as an absolute measure, but as a weathervane." (RT Vol. 7, 143:6-10
23 (Stockton).)

24 b. Mr. Stockton's Conflation of Benchmarks is Misleading

25 306. Another issue with Mr. Stockton's analyses are his confluations of RSI scores suitable
26 for termination under the existing benchmarks with the numbers achieved using different
27 benchmarks. For example, Mr. Stockton defended the results of Folsom Chevrolet's poor showing
28 using the Sacramento DMA as the benchmark by testifying that he would be "very surprised" to hear

1 that GM was “terminating dealers who are in the 75 to 78 percent range.” (RT Vol. 7, 174:17-175:4
2 (Stockton).) But RSI obviously does not use the Sacramento DMA as its typical benchmark, and
3 changing the benchmark alters every dealer’s numbers—in that case, by adding approximately 23
4 points to dealerships’ sales effectiveness. (RT Vol. 10, 106:7-107:6 (Farhat).) Accordingly, if 23
5 points were added to every California dealer’s scores, it seems possible that GM would, in fact, be
6 “terminating dealers who are in the 75 to 78 percent range.” And of course, even with the addition of
7 these percentage points, Folsom Chevrolet still ranked at the bottom compared to every other dealer
8 it was evaluated against.

9 307. Mr. Stockton made similar comments with regards to the “ring” analysis he
10 performed, which he asserted shows Folsom Chevrolet to be approximately 75% sales effective
11 compared to other Sacramento dealers. (RT Vol. 7, 55:4-56:9 (Stockton).) There are numerous
12 issues with Mr. Stockton’s ring analysis, including misleading data adjustments—discussed further
13 below—but one issue was his comment that “if you’re 75 percent as effective as an average dealer,
14 I’ve just not seen GM dealers facing termination at that level.” (*Id.*) Again, however, this is an
15 apples-to-oranges comparison. The numbers in Mr. Stockton’s ring analysis were not applied to
16 every California dealer, and were in fact derived solely from the other four dealers in the Sacramento
17 market. As with the Sacramento DMA analysis, there is no way to know what the “typical” sales
18 effectiveness number would be for terminated dealers if GM made decisions on the basis of this ring
19 analysis. It may be that 75% effectiveness would rank Folsom Chevrolet dead last in the state; Mr.
20 Stockton did not do the work required to find out.

21 c. Mr. Stockton’s Demographic Variables Measure Only Noise

22 308. Mr. Stockton put forward at the hearing the results of a “model” which purportedly
23 takes into account demographic variables that affect sales performance in the Sacramento area. The
24 result of this “demographic adjustment” is, unsurprisingly, that Folsom Chevrolet’s sales
25 expectations are reduced. (*See* P185 at 48, Tab 5 Page 1.) However, the variables chosen by Mr.
26 Stockton have almost no effect on Folsom Chevrolet’s sales expectations themselves. The actual
27 adjustments is simply the result of his use of the arbitrary “5 County Area.” (RT Vol. 5, 200:9-201:1
28

1 (Farhat).) The result is that Mr. Stockton is modeling “just noise in the data,” and the purported
2 model is nothing but “smoke and mirrors.” (*Id.*)

3 309. The premise underlying Mr. Stockton’s demographic variables is the idea that
4 because a demographic variable is statistically correlated with sales at the 95% confidence level, it
5 therefore explains—indeed, *causes*—any variance in sales numbers. Thus, Mr. Stockton’s report
6 shows that the median age and percent of population with at least a 4-year degree is statistically
7 correlated with a variance in registrations within the 5 County Area. (*See* P185 at 49, Tab 5 Page 2.)
8 Fair enough. But Mr. Stockton then goes further, adjusting sales expectations based solely upon
9 these variables (and location within the arbitrary 5 County Area, discussed below), making the
10 implicit assumption that because the variables are correlated to a statistically significant degree, they
11 will always move in tandem.

12 310. This is fallacious. There are many, many variables in the world which are correlated
13 at a high level of statistical significance, but which in reality have nothing to do with each other. In
14 fact, a website known as “Spurious Correlations” exists to catalog such combinations. (*See*
15 <http://www.tylervigen.com/spurious-correlations>.) For example, “Per capita consumption of
16 mozzarella cheese” correlates with “civil engineering doctorates awarded” at a 95% confidence
17 level. (*Id.*) However, it is common sense that a mozzarella cheese company would be foolish to
18 adjust its sales expectations upwards simply because more civil engineering degrees were awarded
19 than usual. The two variables have nothing to do with one another; it is simply a coincidence that
20 they happen to correlate.

21 311. Across a large enough data set, such coincidences are not just possible, but actually
22 guaranteed. A 95% confidence level, by definition, accepts that 5% of all “significant” correlations
23 discovered will in fact be due to random chance.⁷

24
25 ⁷ This is well-explained by a webcomic called XKCD. (*See* <https://xkcd.com/882/>.) In the
26 comic, scientists test a claim that jelly beans cause acne, and find no link. However, when they then
27 proceed to test 20 specific colors of jelly beans, they discover that one of the colors *is* correlated
28 with acne, at a 95% confidence level (“ $p < 0.05$ ”). The reality is, of course, that there is no link
between the two; the scientists simply tested enough variables that they stumbled into the 1 in 20
chance of a coincidental correlation that a 95% confidence level permits.

1 312. Crucially, Mr. Stockton provided no evidence of *how many* variables he looked at
2 before settling on the two presented in his report. He did find that there were other variables that
3 were significant for the state of California as a whole, but not in the 5 County Area, a finding that he
4 essentially shrugged off because “the five county area is different.” (RT Vol. 7, 164:3-20
5 (Stockton).) He also conceded that he has looked at different demographic variables in other cases
6 than those used here. (RT Vol. 7, 165:16-166:6 (Stockton).) Furthermore, the amount of time his
7 firm spent on this project—700 hours, just by the time of his deposition—suggests there were other
8 variables considered that were not reported because they did not reach the level of statistical
9 significance. (RT Vol. 7, 110:14-22 (Stockton).) The possibility that other variables were considered
10 and discarded significantly raises the odds of a false positive correlation.

11 313. In addition, Mr. Stockton failed to show causality, as opposed to mere correlation—in
12 other words, to prove that a change in demographic makeup would cause changes in car-buying
13 behavior. As Mr. Farhat explained, “only a small percentage of th[e] population actually buy new
14 vehicles each year. So you’re trying to estimate what the behavior’s going to be of the car-buying
15 population based on a much different sample, a much different group of consumers.” (RT Vol. 5,
16 113:24-114:16 (Farhat).) In fact, only “about 5 percent of the population buys a new car every year.
17 So to use all population to model what that 5 percent’s going to use is . . . an inappropriate
18 adjustment, especially when you have actual behavior by using actual registration data after the
19 fact.” (*Id.*)

20 314. This is confirmed by the fact that there is no evidence that the variables Mr. Stockton
21 put forward actually drive sales in any meaningful way. The Woodland dealer, for example, was able
22 to raise its sales significantly even though the demographics of the surrounding population remained
23 the same. (RT Vol. 5, 107:3-110:6 (Farhat).) As Mr. Farhat explained, “[i]f Mr. Stockton’s premise
24 of being in these counties and demographics controlling how well a dealer can do, we wouldn’t see
25 these increases. We’d see, regardless of what the dealer did, you’d get a flat level of performance.
26 And that’s not what you see.” (*Id.*) Indeed, it turns out that the closest match to Folsom Chevrolet in
27 the 5 County Area, using the demographics selected by Mr. Stockton, is John L. Sullivan Chevrolet,
28 a very strong performing dealer. (R246.021; RT Vol. 5, 105:13-106:24 (Farhat).)

1 315. Mr. Stockton's model is also confounded by his decision to exclude a single census
2 tract from the AGSSA of nearby dealer Kuni, due to a purported "disproportionate number of Actual
3 Registrations and Registrations at California Average." (See P185 at 49, Tab 5 Page 2.) However,
4 Mr. Farhat examined that tract and "did not find that in the 2016 data; that basically there were nine
5 and ten expected, and actually there was no anomaly that I could find in that census tract." (RT Vol.
6 10, 110:8-111:1 (Farhat).) However, a possible effect of removing that tract is to cause Kuni to look
7 like a slightly worse performer, thereby dropping it below Folsom Chevrolet's ranking for 2016
8 using Mr. Stockton's model. (*Id.*) Consequently, the removal of that tract generates the appearance
9 that the demographic model is causing an adjustment which is actually being caused by manipulation
10 of the underlying data.

11 316. The effect of these demographic variables are then further confounded by a so-called
12 "dummy variable" in Mr. Stockton's model, which simply looks to see whether a dealership is
13 within five particular counties in the Sacramento area—the "5 County Area." (RT Vol. 10, 69:11-
14 70:15 (Stockton).) Separating out the effects of the 5 County Area variable from the demographic
15 variables reveals that the demographic variables themselves make almost no difference in sales
16 expectations. (R246.015; RT Vol. 5, 200:9-201:1 (Farhat).) Thus, it appears that what Mr. Stockton
17 has done is find coincidental correlations—"noise"—rather than valid drivers of sales performance.

18 d. The "5 County Area" is Arbitrary and Meaningless

19 317. As noted, the adjustments made by Mr. Stockton's model are primarily driven by a
20 "dummy" variable that looks to see whether a dealership is within five particular counties in the
21 Sacramento area. (RT Vol. 10, 69:11-70:15 (Stockton).) Notably, Mr. Stockton provided no
22 explanation at the hearing whatsoever as to how or why he selected these five counties, even though
23 Mr. Farhat criticized the selection as arbitrary in his rebuttal testimony and Mr. Stockton was
24 permitted a sur-rebuttal. (RT Vol. 10, 64:19-65:19 (Farhat).) Looking at the map of the 5 County
25 Area, there is no apparent basis to choose these five counties in particular. (See R246.012.) For
26 example, Mr. Stockton included Yolo County, but not any of the other surrounding counties such as
27 Nevada, Yuba, Sutter, or Solano. (See R246.012.) And as Mr. Farhat explained, the claim that the
28

1 five counties are special or “statistically significant” is meaningless, because Mr. Stockton is the one
2 who selected them:

3 Q. And first off, what are your thoughts on the whole idea of the five
4 county selection? I mean Mr. Stockton said you can’t just withdraw
5 that. What’s your thought on the selection of the five county?

6 A. He testified that it’s statistically significant of the dummy variable.
7 That’s very misleading. The reality is he has to pick those five
8 counties. There’s no evidence that he statistically found differences in
9 each of those counties and they grouped them together. He could have
10 picked three counties. He could have picked 20 counties. There’s no
11 magic to say when I selected these counties, they were significant in
12 the state of California.

13 And so it’s kind of a circular argument, and I would say, you know,
14 best case, it’s misleading the way it’s presented.

15 (RT Vol. 10, 107:7-108:1 (Farhat).)

16 318. Unlike the demographic variables, however, use of the 5 County Area variable does
17 have one real effect: it significantly raises the perceived sales effectiveness of every dealership
18 within it, by about 30 points. (RT Vol. 10, 67:6-68:17 (Farhat).) Yet it does not change the relative
19 ranking of the Sacramento dealers, as Folsom Chevrolet remains the worst dealer in the area. (RT
20 Vol. 5, 112:25-113:23 (Farhat).) Thus, Mr. Stockton’s model provides no explanation for Folsom
21 Chevrolet’s poor sales performance relative to its local market. (*Id.*) Indeed, even using this model, it
22 appears to only be 71% sales effective. (*Id.*)

23 e. Mr. Stockton’s “TSI” Metric is Flawed and Nonsensical

24 319. In addition to the model described above, Mr. Stockton also created a metric he called
25 “TSI,” which adds fleet sales and fleet sale expectations onto the existing RSI framework. However,
26 this metric is little more than a sideshow, as even Mr. Stockton admitted that he would not advocate
27 its use. (RT Vol. 7, 89:16-90:22 (Stockton).) The assumptions underlying RSI, such as sales
28 correlating with opportunity, do not hold when applied to TSI; in fact, they actually correlate
negatively within the 5 County Area selected by Mr. Stockton. (*See* R246.023-24.) By way of
example, the use of TSI would cause massive increases in sales expectations for dealerships located

1 near airports, even though those dealers have little chance of capturing all of those sales. (RT Vol. 5,
2 88:18-90:14 (Farhat).)

3 320. Furthermore, fleet sales by their nature are extremely volatile. For this reason, GM's
4 fleet department does not even set objectives for larger, CAP fleet sales, instead focusing only on the
5 smaller dealer fleet sales. (RT Vol. 2, 330:22-331:13 (Ryan).)

6 321. For these reasons, the TSI metric is flawed and nonsensical. Notably, Mr. Stockton
7 did not provide any type of ranking for Folsom Chevrolet under the TSI metric, perhaps because it
8 would expose the flaws of the metric as applied to dealers near airports.

9 f. Mr. Stockton's "Ring" Analysis is Flawed and Misleading

10 322. At the hearing, Mr. Stockton put forward a version of the "ring" analysis Mr. Farhat
11 had previously used to show that Folsom Chevrolet is not sales-effective compared to other
12 Sacramento dealers. (See P186 at 14, Tab 5 Page 1.) The analysis purports to use Urban Science
13 data. (*Id.*) Mr. Stockton testified that using that data, he calculated that Folsom had made sales of
14 477 units within the 20 mile "ring," against an expectation of 617, meaning it was at least 75% as
15 effective in those areas as other Sacramento dealers. (RT Vol. 7, 55:4-56:9 (Stockton).)

16 323. However, Mr. Farhat explained on rebuttal that there were several issues with Mr.
17 Stockton's analysis. For example, he had misrepresented that Urban Science's data was restricted to
18 the Sacramento APR, which is false. (RT Vol. 10, 74:6-75:15 (Farhat).)

19 324. In addition, Mr. Stockton had calculated the rings in a different manner than Urban
20 Science does, which changes the distribution of sales throughout the various rings. (*Id.*) When Mr.
21 Farhat recalculated what Mr. Stockton's analysis purported to show, he found that Folsom Chevrolet
22 sold 447 units against an expectation of 628 within those twenty miles, resulting in performance that
23 was 71% of the Sacramento average. (RT Vol. 10, 75:16-76:18 (Farhat); R290.003.)

24 325. Thus, Mr. Stockton's presentation of this data both "deflated the expectation and
25 inflated the sales." (RT Vol. 10, 86:14-21 (Farhat).) Perhaps this was mere coincidence, but the
26 result was to inappropriately make Folsom Chevrolet look more effective than it is.

27 g. Mr. Stockton Failed to Identify any Measure of Sales Performance
28 Showing Folsom to be Even an Average Dealership

1 326. Mr. Stockton committed additional methodological errors beyond those set forth
2 above, which may be explored more fully on rebuttal. But even placing those to the side, it is
3 significant that, at bottom, Mr. Stockton failed to put forward *any* reliable measure of sales
4 performance that showed Folsom Chevrolet to be even an average performer. Folsom Chevrolet is
5 below 100 percent using RSI; it is below 100 percent using Mr. Stockton's demographic model; it is
6 below 100 percent using Mr. Stockton's ring analysis; it is below 100 percent using Northern
7 California as the benchmark for market share; and it is below 100 percent using the Sacramento
8 DMA as the benchmark for market share. (RT Vol. 7, 173:18-174:16 (Stockton).)

9 **E. General Motors' use of CSI to Measure Dealership Customer Satisfaction is**
10 **Reasonable**

11 327. Customer satisfaction is primarily measured by General Motors in the form of
12 customer surveys. (RT Vol. 1, 99:22-100:12 (Stinson).) There are two different surveys that are
13 administered: The PDS (Purchase and Delivery Satisfaction) survey relates to a customer's
14 experience during the purchase process for a new vehicle, and the SSS (Service Satisfaction Score)
15 survey relates to a customer's experience when their vehicle needs warranty repair or maintenance.
16 (RT Vol. 1, 100:14-102:10 (Stinson).) This is comparable to the practices employed by other
17 manufacturers. (RT Vol. 5, 125:13-126:14 (Farhat).)

18 328. Mr. Stockton criticized GM's use of CSI and surveys to measure customer
19 satisfaction. However, these criticisms were notably lacking in any evidentiary support or even the
20 most cursory analysis. For example, Mr. Stockton asserted without evidence that the dealership's
21 scores may be skewed by "nonresponse bias," *i.e.*, the fact that not all customers, or all types of
22 customers, respond to surveys. (RT Vol. 7, 177:14-25 (Stockton).) However, he conceded that this
23 issue could apply to all Chevrolet dealers just as to Folsom Chevrolet. (RT Vol. 7, 178:1-5
24 (Stockton).) Mr. Stockton did no analysis to determine whether such a bias disproportionately affects
25 Folsom Chevrolet. (RT Vol. 7, 179:6-10 (Stockton).) Similarly, he did no analysis to determine
26 whether Folsom Chevrolet is disproportionately affected by the fact that a survey doesn't tell you
27 "how happy the person" is, just "how they responded." (*Id.*; RT Vol. 7, 177:2-13 (Stockton).) He did
28 not even ask for documents to do such an analysis. (RT Vol. 7, 178:24-179:5 (Stockton).)

1 329. In reality, Folsom Chevrolet is a relatively large dealership that likely receives
2 “hundreds of responses” per year. (RT Vol. 5, 184:3-14 (Farhat).) As a result, it is unlikely that its
3 CSI results are infected by any kind of sample size bias. (*Id.*; RT Vol. 4, 112:3-14 (Meier).) In any
4 event, the dealership never raised any concern with GM about the survey process prior to the
5 hearing. (RT Vol. 4, 112:17-113:3 (Meier).)

6 330. The truth is just the opposite: Folsom Chevrolet relied on the CSI reports. They were
7 utilized to determine whether salespeople were achieving effective customer satisfaction. (RT Vol.
8 8, 39:21-40:3 (L. Crossan).) In fact, Folsom Chevrolet employees would go over the reports daily.
9 (RT Vol. 8, 96:1-12 (L. Crossan).) And in all that time, according to Larry Crossan, the former
10 General Manager, they never had “any concerns about the data or the reliability of the data.” (*Id.*)

11 **V. FOLSOM CHEVROLET’S INVESTMENTS**

12 **A. Definitions**

13 **1. The Definition of Investment**

14 331. The definition of investment is simple: “putting something at risk in hopes of a
15 return.” (RT Vol. 4, 127:24-128:7 (Gaspardo).) This is an intuitive and “generally understood”
16 definition of investment “across any sort of business or finance.” (RT Vol. 4, 128:11-15 (Gaspardo).)

17 332. An investment is not the present value of an asset purchased, but rather the amount of
18 money “at risk,” typically the amount used to purchase that asset. (RT Vol. 4, 209:17-210:12
19 (Gaspardo).) As Mr. Gaspardo explained, “if I buy a Bitcoin today for a thousand dollars and it goes
20 up to a million dollars, my investment was still the thousand dollars. I didn’t invest any new amounts
21 of money. I don’t have any additional amounts at risk.” (*Id.*)

22 333. Similarly, any consideration of investment must consider any liabilities or amounts
23 borrowed. A \$500,000 house purchased with purely borrowed money, and no equity, is not a
24 \$500,000 investment for the purchaser because there is “no money at risk.” (RT Vol. 4, 217:7-25
25 (Gaspardo).) In that scenario, the investment would all be from the bank or mortgage issuer. (RT
26 Vol. 4, 166:1-16 (Gaspardo).)

27 334. With respect to Folsom Chevrolet, on the surface, its investment is equal to its net
28 worth. (RT Vol. 4, 135:22-137:5 (Gaspardo).) That number shows, “mathematically, how much

1 money does the owner have at risk in the business.” (*Id.*) Thus, the net worth of the enterprise is “by
2 definition[,] how much money the owner has invested into the business.” (*Id.*)

3 2. **The Definition of Permanent Investment**

4 335. The definition of a “permanent” investment is also simple: whether that investment
5 can be recovered by conversion into cash. (RT Vol. 4, 128:22-129:22 (Gaspardo).) It is equivalent to
6 a “sunk cost.” (RT Vol. 4, 128:22-129:22 (Gaspardo).) The concept of non-recoverable sunk costs is
7 widely accepted within business and finance. (RT Vol. 4, 132:17-133:6 (Gaspardo).) Furthermore, it
8 fits with cases applying the phrase “permanency of investment” under the California Vehicle Code.
9 (RT Vol. 4, 131:9-132:16 (Gaspardo).)

10 336. Thus, a purchase of a vehicle that can be immediately re-sold is not a “permanent”
11 investment, because it can easily be recovered. (RT Vol. 4, 129:23-131:8 (Gaspardo).) However, an
12 investment in “a highly specialized piece of signage . . . that would not have a ready market” would
13 be permanent, “because no one else is going to want that.” (RT Vol. 4, 129:23-131:8 (Gaspardo).)

14 B. **Folsom Chevrolet’s Investments**

15 337. Without yet looking to permanency, the evidence in the record shows that Folsom
16 Chevrolet’s investment, which is equal to its net worth, is approximately \$3.6 million dollars. (RT
17 Vol. 4, 135:11-137:5 (Gaspardo); R243E.001; R249.004.) This is the amount of total dealership
18 assets the dealership has reported over its liabilities, *i.e.*, the amount left over if all dealership
19 liabilities were paid. (*Id.*) However, as described below, there are additional considerations which
20 warrant a downward adjustment to this amount.

21 1. **Folsom Chevrolet’s Net Worth Contains Funds Invested by General** 22 **Motors Under the EBE Program**

23 338. Folsom Chevrolet received approximately \$2.37 million dollars in incentive payments
24 under the “EBE” program from 2009 to 2016. (R249.005; R256.) This money is paid by GM
25 primarily to incentivize dealership remodeling of the type Folsom Chevrolet performed from 2013 to
26 March 2014. (RT Vol. 1, 191:8-25 (Stinson).) However, according to Mr. Crossan, Folsom
27 Chevrolet only paid between \$800,000 and \$900,000 for that construction. (RT Vol. 9, 29:1-7 (M.
28 Crossan).)

1. 339. As a result, any funds received from GM in excess of construction costs would have
2 been simply retained as income by Folsom Chevrolet. (RT Vol. 4, 161:25-163:23, 214:8-215:10
3 (Gaspardo).) There is nothing wrong with doing so, but it does merit consideration in the context of
4 determining *Folsom Chevrolet's* investment. (*Id.*) To the extent the dealership's \$3.6 million net
5 worth reflects funds received directly from GM to improve the business, that total does not show
6 entirely Folsom Chevrolet's investment, but rather GM's investment as well. (*Id.*)

7 **2. The Initial Investments in Folsom Chevrolet were Made by General**
8 **Motors**

9 340. In addition to the EBE funds, the record also reflects that a large majority of the
10 initial investments into Folsom Chevrolet were in fact made by General Motors, not Folsom
11 Chevrolet or Mr. Crossan. Most concretely, of the dealership's original \$1 million capitalization,
12 General Motors' affiliate Motors Holding provided \$750,000. (RT Vol. 6, 107:5-108:13 (M.
13 Crossan).) That amount was slowly repaid by Folsom Chevrolet out of a portion of its profits for the
14 next several years. (*Id.*)

15 341. However, General Motors also made investments in the dealership in other ways. For
16 example, when Folsom Chevrolet opened, it was provided with up to "\$780,000 worth of parts" that
17 GM had kept safe for Folsom Chevrolet from the prior dealership in Folsom. (RT Vol. 6, 105:14-
18 106:17 (M. Crossan).) In addition, GM initially provided Folsom Chevrolet with a facility that "was
19 a 48,000-square-foot building that was probably the nicest building built in all of Northern
20 California at that time." (RT Vol. 6, 110:8-111:5 (M. Crossan).) "[T]here was nothing that we had to
21 do other than really just clean it up and get it all turned on." (*Id.*)

22 342. In 1998, Folsom Chevrolet chose to move into a new facility at the Folsom Auto Mall
23 as the third dealership in that area. The property was purchased not by Folsom Chevrolet, but by Mr.
24 Crossan's personal trust, and the capital needed to buy the land and construct the facility came from
25 GM affiliate GMAC. (RT Vol. 6, 112:9-114:3 (M. Crossan).)

26 **3. Marshal Crossan's Investments have been Recouped Through Years of**
27 **Profits**
28

1 343. The record reflects that Mr. Crossan and Folsom Chevrolet have made an excellent
2 return from their investments over the years. Operating reports show a dealership profit of \$305,878
3 in 2012, \$157,922 in 2013, \$115,499 in 2014, \$1,489,461 in 2015, and \$1,639,756 in 2016. (*See*
4 R243A-E (2012-2016 Operating Reports) at page 1 line 63.) The total profit over this five-year
5 period was therefore \$3,708,516. (*Id.*)

6 344. However, that profit is not the total return on investment. Mr. Crossan has received a
7 salary from Folsom Chevrolet in the amount of \$288,000 per year since at least 2012. (R243A-E at
8 page 2 line 8.) In addition, he received a \$397,302 dividend in 2016 to cover his personal income
9 taxes. (RT Vol. 8, 158:24-159:16 (M. Crossan).) Thus, Mr. Crossan's personal income from the
10 dealership was \$1,837,302 from 2012-2016.

11 345. In addition, Folsom Chevrolet pays rent and property taxes on behalf of the properties
12 owned by Mr. Crossan's real estate trust. While any dealership would be obliged to pay rent, Folsom
13 Chevrolet pays significantly more in rent per new unit—more than two thousand dollars more, on
14 average—than did the composite groups studied in 2014, even the composite made up of other
15 Sacramento dealers. (R263.015.) Mr. Stinson testified he views Folsom Chevrolet's rent as "really
16 high," particularly since it is going solely to Mr. Crossan as the landlord. (RT Vol. 1, 126:14-127:13
17 (Stinson).) Indeed, the amounts are significant: \$1,100,700 in rent and \$137,436 in taxes in 2012;
18 \$1,140,100 in rent and \$46,411 in taxes in 2013; \$1,143,600 in rent and \$70,400 in taxes in 2014;
19 \$1,143,600 in rent and \$74,605 in taxes in 2015; and \$1,144,500 in rent and \$74,605 in taxes in
20 2016. (R243A-E at page 2 lines 41, 45.) This represents expenditures on behalf of Mr. Crossan's
21 trust in the amount of \$6,075,957 over that period, or just over \$1.2 million per year. (*Id.*)

22 346. Thus, Mr. Crossan did not dispute that he has made a good return on the money spent
23 to buy out Motors Holding. (RT Vol. 8, 131:19-132:7 (M. Crossan).) Folsom Chevrolet's expert, Mr.
24 Woodward, agreed that "based on reading the retained earnings and dividends, Folsom Chevrolet
25 has had a positive return on its initial investment." (RT Vol. 6, 53:8-16 (M. Crossan).)

26 **C. Folsom Chevrolet's Claimed "Permanent" Investments are not Permanent**

27 347. Folsom Chevrolet's expert, Mr. Woodward, claimed that Folsom Chevrolet has
28 permanent investments in a potentially very large range, estimating the amount at \$14,700,00 to

1 \$37,363,191, but also estimating its total loss in value to be \$8,675,000. (P184 at 5-6.) He refused to
2 give a more precise estimate than that. However, many of the values considered by Mr. Woodward's
3 analysis are either not permanent or not investments. (RT Vol. 4, 126:23-127:21 (Gaspardo).)
4 Indeed, Mr. Woodward conceded that the high-end estimate he provided is "probably too high" and
5 not "something that the judge should consider." (RT Vol. 6, 36:8-14, 77:23-78:3 (Woodward).)

6 **1. Many of Mr. Woodward's Numbers are Simply Unverified Estimates by**
7 **Folsom Chevrolet's Counsel**

8 348. Before examining Mr. Woodward's specific claims, it is worth noting that many of
9 the numbers in his report take as true the unverified estimates of value he received from Folsom
10 Chevrolet's counsel. For example, Mr. Woodward testified that for this case, he "reviewed one or
11 two financial statements" and "talked with [Folsom Chevrolet's counsel,] Mr. Rasmussen and his
12 former associate." (RT Vol. 6, 50:9-17 (Woodward).) He did not recall talking to Mr. Crossan. (*Id.*)

13 349. Thus, the basis for Mr. Woodward's valuation of the real estate owned by Mr.
14 Crossan's trust was "[d]iscussing with someone at [Folsom Chevrolet's law] firm who talked to the
15 dealer and [who gave] their best estimated value." (RT Vol. 6, 22:24-23:8 (Woodward).) There were
16 no appraisals performed, and no documents have been produced showing the original cost of the
17 property, the initial mortgage amount, or the present mortgage amount. (RT Vol. 4, 164:15-166:16
18 (Gaspardo); RT Vol. 6, 60:15-61:3 (Woodward).)

19 350. Similarly, Mr. Woodward presented an amount for a computer vendor lease owed by
20 the dealership which "came from the dealership's counsel." (RT Vol. 6, 67:11-68:13 (Woodward).)
21 He did not do anything to verify that amount, including reviewing that lease. (*Id.*) Similarly, he
22 testified that he had not attempted to review the lease between Argonaut and the dealership before
23 providing his opinions regarding the real estate. (*Id.*)

24 **2. Mr. Woodward Simply Summed Assets Instead of Considering**
25 **Permanent Investment**

26 351. The next issue with Mr. Woodward's analysis is that he appears to have substituted
27 any notion of "investment" with "valuation of assets." Specifically, even the low end—\$14.7
28 million—of Mr. Woodward's valuations of Folsom Chevrolet's "permanent investment" looks

1 solely at total assets, without considering offsetting liabilities or the ability to recover funds. (RT
2 Vol. 6, 78:4-78:24 (Woodward).) In fact, Mr. Woodward admitted he did not even “subtract out
3 nonpermanent assets” from this number. (*Id.*)

4 352. The only rationale Mr. Woodward provided for these decisions was his oft-repeated
5 but circular claim that “we’re valuing assets.” (*See, e.g.*, RT Vol. 6, 34:10-19, 84:25-85:9
6 (Woodward).) Thus, Mr. Woodward claimed at the hearing that if a buyer puts down \$100,000 to
7 buy a house, and takes out a \$400,000 mortgage as well, his “investment in that house” would be
8 “\$500,000.” (RT Vol. 6, 85:11-86:8 (Woodward).)

9 **3. Many Folsom Chevrolet Assets Considered by Mr. Woodward are not**
10 **Permanent**

11 353. Mr. Woodward’s analyses based on total assets drastically inflates the amount of
12 actual investment in Folsom Chevrolet. Even placing aside the issue of offsetting liabilities, Mr.
13 Woodward conceded that his valuation based on total issues includes “highly current assets, such as
14 cash.” (RT Vol. 6, 35:11-24 (Woodward).) This is true even though Mr. Woodward considers the
15 permanency of cash to be “minimal.” (RT Vol. 6, 33:1-5 (Woodward).) Mr. Gaspardo, by contrast,
16 explicitly considered the recoverability, and thus permanency, of all of Folsom Chevrolet’s assets
17 listed on its operating report.

18 a. Folsom Chevrolet’s Current and Working Assets are Recoverable and
19 Thus not Permanent Assets

20 354. The first type of assets listed on Folsom Chevrolet’s operating report are “current
21 assets,” which are assets “expected to be turned into cash within 12 months.” (RT Vol. 4, 137:15-21
22 (Gaspardo).) Mr. Gaspardo went through each of these categories of assets and, working from his
23 long experience, “thought about whether or not there are things in there that may in fact be of a
24 longer term [or] that I felt, for whatever reason, may evidence actually a permanent investment.”
25 (RT Vol. 4, 137:22-138:17 (Gaspardo).) However, he ultimately concluded that none of these items
26 are permanent. (*Id.*)

27 355. For example, because cash in the bank “literally could be pulled out tomorrow,” it is
28 by definition not permanent. (RT Vol. 4, 138:18-139:20 (Gaspardo).) Cash “in transit” would take

marginally longer to remove, but is nonetheless on its way to the dealership and could easily be recovered. (*Id.*) Together, cash and cash-like assets total \$2,776,000. (RT Vol. 4, 139:23-140:1 (Gaspardo).)

356. Going down the asset sheet on Folsom Chevrolet's operating report, the next category of assets are receivables, which means "that the transaction has taken place" but the money has not yet been wired or transferred. (RT Vol. 4, 140:2-141:8 (Gaspardo).) However, "most of these receivables would be expected to be collected in 30 days or less," with an outside timeframe of "45 days at the absolute most." (*Id.*) These assets, which sum to over \$2 million, are therefore easily recoverable and not permanent. (*Id.*)

357. The next category of assets are working capital, including vehicle inventory. (RT Vol. 4, 141:9-145:11 (Gaspardo).) These vehicles may "take a little longer to convert into cash," but the reality is that "there's a very fluid market for both new and used car inventory," and "there are situations where GM will even buy back vehicles." (*Id.*) As a result, these items "can be turned into cash pretty easily" and are therefore not permanent. (*Id.*) This total sums to about \$14 million, but is offset by floor plan loans of approximately \$15.3 million. (*Id.*)

358. Mr. Gaspardo also considered prepaid expenses for taxes, insurance, and other. (RT Vol. 4, 145:12-146:11 (Gaspardo).) These expenses are prepaid because "you know that it's an expense you're going to incur." (*Id.*) As a result, it is highly likely any amounts paid will be recovered, and so these assets—just over \$800,000—are not permanent investments. (*Id.*; R243E.001)

359. The final category of assets of this type are working assets, including lease and rental vehicle units, which can be sold as well. (RT Vol. 4, 146:12-147:4 (Gaspardo).) This amount, \$427,000, is therefore not permanent. (*Id.*; R243E.001.)

360. Overall, Mr. Gaspardo found no current or working assets of Folsom Chevrolet to be permanent investments within the meaning of the Vehicle Code. (RT Vol. 4, 147:8-19 (Gaspardo).)

b. Folsom Chevrolet's Fixed Assets are Recoverable and Thus not Permanent Assets

1 361. Lines 47 through 57 of the operating report shows fixed assets, which may contain
2 “highly specialized assets” that could potentially be considered permanent assets. (RT Vol. 4,
3 147:20-150:25 (Gaspardo).) Mr. Gaspardo was unable to determine whether any of these assets
4 were, in fact, permanent, as no breakdown of the numbers was provided, but he noted that Mr.
5 Woodward estimated their value to be \$400,000. (*Id.*) If that number is credited,⁸ it appears the fixed
6 assets are fully recoverable, as Folsom Chevrolet only reported the value of these items as \$218,568.
7 (*Id.*; R243E.001 at line 57.) The remainder of the original value of those assets has been used up—
8 depreciated—and the investment in those assets returned. (RT Vol. 4, 149:7-150:9 (Gaspardo).)

9 c. Folsom Chevrolet’s Remaining Investments and Obligations are Small
10 and Unverified

11 362. Folsom Chevrolet has some potential additional obligations which may be considered
12 investments, but none are large or well-supported in the record. For example, there are potential
13 contingent liabilities the dealership may have pay in the future, such as warranty expenses yet to be
14 incurred. (RT Vol. 4, 182:14-183:25 (Gaspardo).) Mr. Woodward estimated the amount at \$89,000,
15 but Mr. Gaspardo noted there did not appear to be any basis for that estimate. (*Id.*) As it turns out,
16 Mr. Woodward’s estimate was based on a “formula,” which was solely to take “the average month
17 and multiply it times 24,” or “if you got a 12-month statement, take the chargebacks and multiply it
18 by two.” (RT Vol. 6, 64:18-67:2 (Woodward).) Mr. Woodward acknowledged that finance, credit,
19 insurance, and service contracts have terms which specifically control “the ways in which a
20 customer could cancel as well as the amount of the chargeback,” but he did not review them for this
21 case. (*Id.*) Even accepting his estimate of \$89,000, however, this is an “expense or cost of sale,” not
22 an investment, and certainly not a permanent investment. (RT Vol. 6, 66:3-11 (Woodward).)

23
24
25 ⁸ Despite being propounded as an accounting expert, Mr. Woodward testified he did not do
26 “an exact calculation” or take into account the time those assets have been held or their depreciation.
27 (RT Vol. 6, 58:18-59:9 (Woodward).) Indeed, he had no idea how long those assets had been held or
28 used by the dealership. (RT Vol. 6, 62:8-63:25 (Woodward).) Instead, he used a “rule of thumb,”
which was simply to take “half of original cost” and then subtract a little more to reach the round
figure of \$400,000. (*Id.*)

1 363. Mr. Woodward also pointed to a long-term computer lease as a potential obligation of
2 Folsom Chevrolet. (RT Vol. 4, 184:1-23 (Gaspardo).) However, there was no information provided
3 regarding this lease, including whether it has "an out clause" or other method of avoiding expenses.
4 (*Id.*) Of course, as discussed above, Mr. Woodward did not review the lease himself, or do anything
5 to verify the amount of the expense given to him by counsel. (RT Vol. 6, 67:11-68:4 (Woodward).)

6 364. Finally, Mr. Crossan has personally guaranteed the floor plan of the dealership. (RT
7 Vol. 8, 149:1-15 (M. Crossan).) By definition, this is not an investment of Folsom Chevrolet because
8 it has no money at risk of loss. (RT Vol. 4, 180:20-182:13 (Gaspardo).) Even if Mr. Crossan's
9 exposure were considered, though, there is no real risk of loss at present, because Folsom Chevrolet
10 has \$3.6 million more in assets than in liabilities. (*Id.*) As a result, both Mr. Crossan and Mr.
11 Woodward agreed there is no expectation that guarantee will be called. (RT Vol. 6, 54:20-55:24
12 (Woodward); RT Vol. 8, 149:1-15 (M. Crossan).)

13 d. Folsom Chevrolet's Real Property is not an Investment of the
14 Franchisee, and is not a Permanent Investment

15 365. As discussed above, the real property on which Folsom Chevrolet sits, as well as a
16 nearby storage lot, is not owned by the dealership, but by a trust owned by Mr. Crossan. (RT Vol. 4,
17 152:5-21 (Gaspardo); RT Vol. 6, 149:3-7, 152:15-154:7 (M. Crossan), RT Vol. 9, 26:3-27:3 (M.
18 Crossan).) Thus, any amount paid to purchase those properties are not investments of the
19 "franchisee" as considered by the Vehicle Code. (R249.005) Mr. Gaspardo explained the difference
20 as follows:

21 You got to remember the dealership and the real estate exist as two
22 separate entities. He's basically in two different businesses. He's in a
23 real estate business and he's in a car dealer business.

24 So he could sell the car dealer business, and as part of that sale, have a
25 long-term lease on his property. And as a matter of fact, that's a pretty
26 -- I don't want to say common, but that's a thing that you do see with a
27 lot of business owners who are ready to retire: I'm going to sell my
28 operating business and I'm going to go lay on the beach in Florida and
 you can send my rent check to Florida and I continue to have some
 cash flow that way.

(RT Vol. 4, 175:18-176:14 (Gaspardo).)

1 366. Even if the real estate were considered an investment of the dealership, however, it is
2 not permanent. Mr. Woodward estimated the cost of the property and facility at \$4 million dollars,
3 but estimated its current fair market value at \$7.5 million. (RT Vol. 4, 176:24-177:7 (Gaspardo).)
4 Thus, Mr. Crossan would stand to gain approximately \$3.5 million if he were to sell the property.
5 (*Id.*) Mr. Woodward also estimated that the value could drop to \$5.6 million if the property were
6 long unoccupied, but that would still represent a positive return over the initial investment. (RT Vol.
7 4, 177:13-23 (Gaspardo).) Mr. Crossan, meanwhile, estimated the value of the property even higher,
8 at \$7.5 to \$8.5 million, but noted it could “easily exceed that amount of money.” (RT Vol. 6, 160:4-
9 17 (M. Crossan).) And so, regardless of whether the investment is deemed an asset of the dealership
10 or not, Mr. Crossan’s investment in real estate is not permanent because it can be easily sold for a
11 positive return. (RT Vol. 4, 176:24-178:15 (Gaspardo).)

12 367. If Mr. Crossan chose not to sell the property, he could still recover his investment in
13 the form of rent. As explained above, he currently receives over \$1.1 million in rent per year.
14 Furthermore, GM is obligated under the terms of the lease for the property to rent that property until
15 2024. (RT Vol. 4, 166:17-167:10, 169:2-11, 170:16-171:15 (Gaspardo).) It also has obligations
16 under the Dealer Agreement to occupy or find a buyer for the real estate if Folsom Chevrolet were to
17 be terminated. (RT Vol. 4, 178:16-179:8 (Gaspardo).) Thus, there is no real risk of loss, and
18 accordingly, no permanent investment. (RT Vol. 4, 179:13-180:19 (Gaspardo).)

19 e. Folsom Chevrolet’s Goodwill is not an Investment

20 368. The final “asset” treated by Mr. Woodward as a permanent investment is the
21 goodwill, or “blue sky” value, associated with Folsom Chevrolet. (RT Vol. 4, 186:4-189:8
22 (Gaspardo).) This is the amount of money that could be obtained in a sale above the book value of its
23 net worth, *i.e.*, \$3.6 million. (*Id.*) Mr. Gaspardo outlined several reasons why the potential goodwill
24 of the dealership cannot be considered a permanent investment, but the first is that it is not an
25 investment at all, because no money was put at risk to acquire that goodwill beyond what was
26 already considered. (*Id.*) Rather, it is a “hoped for return.” (*Id.*)

27 369. Second, any goodwill that does exist “almost entirely relates to the dealer agreement
28 with GM,” which means that if Folsom Chevrolet’s Dealer Agreement is terminated due to

1 noncompliance with that agreement, it *should* lose the goodwill. (*Id.*) As Mr. Gaspardo explained, if
2 the goodwill were truly associated with Folsom Chevrolet, “it wouldn’t matter that the agreement
3 was terminated because you could carry that goodwill somewhere else” (*Id.*)

4 370. Third, to the extent Mr. Crossan is concerned about losing this “hoped for return,”
5 there is a very ready market to sell the dealership which would permit him to realize that return. (*Id.*)
6 As a corollary to that, because this amount “literally could be realized in a 30 or 60-day period by
7 selling the dealership,” it cannot be a permanent investment. (*Id.*)

8 371. Fourth, and finally, goodwill is not a permanent investment because its value—if
9 any—can only be determined after an actual transaction is made. (RT Vol. 4, 229:25-231:19
10 (Gaspardo).) Furthermore, it is inherently volatile, subject to large swings as a result of, *e.g.*,
11 termination of a franchise agreement, but also events like loss of a key supplier or customers. (*Id.*)
12 Indeed, even Folsom Chevrolet was unable to give a consistent valuation of its goodwill. Mr.
13 Woodward provided values ranging from over \$7 million to approximately \$6 million (using the
14 “Carl Method,” which he considers the best approach). (RT Vol. 6, 74:17-75:1; P184 at 4
15 (Woodward).) However, Mr. Crossan opined that the goodwill would be \$11 million, even as he
16 conceded he had not “done a real depth [*sic*] dive” on the value, had never valued goodwill for any
17 other business, and had never seen the issue arise in mediations or other proceedings. (RT Vol. 6,
18 163:7-167:18 (M. Crossan).)

19 372. Ultimately, even Mr. Woodward admitted that he doesn’t “know where you tie
20 [goodwill] into the word ‘investment,’” and “[i]t’s possible it’s not permanent.” (RT Vol. 6, 32:8-15
21 (Woodward).) As a result of all of these issues, it is inappropriate to consider goodwill an
22 investment, and certainly inappropriate to consider it to be a permanent investment. (RT Vol. 4,
23 187:9-189:8 (Gaspardo).)

24 **PROPOSED CONCLUSIONS OF LAW**

25 **I. GENERAL MOTORS’ PROCESSES AND PROCEDURES ARE REASONABLE**

26 373. General Motors’ inventory allocation process is reasonable.

27 374. General Motors’ method of assigning APRs and AGSSAs is reasonable.

1 375. General Motors' business decision to preference retail sales by dealerships over fleet
2 sales is reasonable.

3 376. General Motors' use of RSI to measure dealership sales performance is reasonable.

4 377. General Motors' use of CSI to measure dealership customer satisfaction performance
5 is reasonable.

6 **II. GENERAL MOTORS' PROCESSES AND PROCEDURES WERE REASONABLY**
7 **APPLIED TO FOLSOM CHEVROLET**

8 378. Folsom Chevrolet was allocated sufficient inventory to meet its sales requirements.

9 379. The AGSSA assigned to Folsom Chevrolet is reasonable.

10 380. Folsom Chevrolet made fleet sales that harmed its retail sales performance in defiance
11 of GM guidelines and suggestions.

12 381. General Motors' use of RSI to measure Folsom Chevrolet's sales performance was
13 reasonable.

14 382. General Motors' use of CSI to measure Folsom Chevrolet's customer satisfaction
15 performance was reasonable.

16 **III. GM HAS GOOD CAUSE TO TERMINATE FOLSOM CHEVROLET**

17 383. Folsom Chevrolet transacted little business, compared to the business available to it.
18 (Cal. Veh. Code 3061(a).)

19 384. Folsom Chevrolet made minimal investments and incurred minimal obligations
20 necessary to perform its part of the franchise. (Cal. Veh. Code 3061(b).)

21 385. Folsom Chevrolet's investments are not permanent. (Cal. Veh. Code 3061(c).)

22 386. It is beneficial to the public welfare for Folsom Chevrolet's franchise to be replaced.
23 (Cal. Veh. Code 3061(d).)

24 387. Folsom Chevrolet does not have adequate motor vehicle sales and service facilities,
25 equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the
26 consumers for the motor vehicles handled by the franchisee, and has not been and is not rendering
27 adequate services to the public. (Cal. Veh. Code 3061(e).)

388. Folsom Chevrolet has, at times, failed to fulfill the warranty obligations GM requires it to perform. (Cal. Veh. Code 3061(f).)

389. Folsom Chevrolet failed to comply with the terms of the Dealer Agreement (Cal. Veh. Code 3061(f).)

390. General Motors has good cause to terminate Folsom Chevrolet's Dealer Agreement.

PROPOSED DECISION

391. Protest No. PR-2483-16 is denied. General Motors has met its burden of proof under Vehicle Code Section 3066(b) to establish that it has good cause to terminate Folsom Chevrolet's Dealer Agreement.

CONCLUSION

For the reasons outlined above, good cause exists to terminate Folsom Chevrolet's Dealer Agreement.

Dated: May 16, 2018

Respectfully submitted,

/s/ Robert E. Davies

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PROOF OF SERVICE

CAPTION: FOLSOM CHEVROLET, INC. d/b/a FOLSOM CHEVROLET, Protestant
v. GENERAL MOTORS, LLC, Respondent

BOARD: NEW MOTOR VEHICLE BOARD

PROTEST NOS.: PR-2483-16

I am employed in the County of Sacramento, State of California. I am over the age of 18 years and not a party to this action. My business address is P.O. Box 277010, Sacramento, California 95827-7010. On **May 16, 2018**, I served the foregoing **RESPONDENT GENERAL MOTORS LLC'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW** on each party in this action, as follows:

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Attorneys for Protestant

- ☒ (BY MAIL) I caused such envelope to be deposited in the United States Mail at Sacramento, California, with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing documents for mailing. It is deposited with the United states postal service each day and that practice was followed in the ordinary course of business for the serve herein attested to.
- ☐ (BY FACSIMILE) The facsimile machine I used complied with California Rules of Court, Rule 2003, and no error was reported by the machine. Pursuant to California Rules of Court, Rule 2006(d), I caused the machine to print a transmission record of the transmission, a copy of which is attached to this Affidavit.
- ☐ (BY FEDERAL EXPRESS) I caused such envelope to be delivered by air courier, with the next day service.
- ☒ (BY E-MAIL) at the e-mail address listed above.

Executed on **May 16, 2018**, at Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct.


Dawne Camilleri